No. 98-347-CMY Title: William J. Clinton, President of the United States, et al., Petitioners
v.
James T. Goldsmith

Docketed:
August 27, 1998 Court: United States Court of Appeals for the Armed Forces

Entry	Date	Proceedings and Orders
	Jul 17 1998	Application (A98-63) to extend the time to file a petition for a writ of certiorari from July 28, 1998 to August 28, 1998, submitted to The Chief Justice.
	Jul 21 1998	Application (A98-63) granted by the Chief Justice extending the time to file until August 27, 1998.
	Aug 26 1998	Petition for writ of certiorari filed. (Response due September 26, 1998)
	Sep 25 1998	Motion of National Institute of Military Justice for leave to file a brief as amicus curiae filed.
	Sep 28 1998	Brief of respondent James Goldsmith in opposition filed.
	Oct 8 1998	Reply brief of petitioners William J. Clinton, President of the United States, et al. filed.
	Oct 14 1998	DISTRIBUTED. October 30, 1998
	Nov 2 1998	Motion of National Institute of Military Justice for leave to file a brief as amicus curiae GRANTED.
	Nov 2 1998	Petition GRANTED. SET FOR ARGUMENT March 22, 1999. **********
	Dec 16 1998	Joint appendix filed.
	Dec 16 1998	Brief of petitioners William J. Clinton, President of the United States, et al. filed.
	Jan 15 1999	Brief of respondent James T. Goldsmith filed.
	Feb 11 1999	CIRCULATED.
	Feb 18 1999	Reply brief of petitioners William J. Clinton, President of the United States, et al. filed.
	Mar 9 1999	Record filed.
	Mar 17 1999	Corrected copies of petitioners' brief on the merits received and distributed.
	Mar 22 1999	ARGUED.
	Mar 31 1999	Letter from the Solicitor General filed.
	Mar 31 1999	Letter from the Solicitor General received and distributed.

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No. ,

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONER

v.

JAMES T. GOLDSMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

In Section 563 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. XI, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate the military status and pay of, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. 1161(b)(2), 1167. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. 1161(b)(2) and 1167.

2. Whether the President's exercise of authority under 10 U.S.C. 1161(b)(2) and 1167 in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

PARTIES TO THE PROCEEDING

Petitioners are William J. Clinton, President of the United States; William S. Cohen, Secretary of Defense; F. Whitten Peters, Acting Secretary of the Air Force; Lieutenant General David W. McIlvoy, Vice Commander, HQ Air Education and Training Command, Randolph Air Force Base, Texas. Petitioners were named as respondents/appellees in the court of appeals. All petitioners appear in their official capacities only. The claims against the following individuals were dismissed by the court of appeals as moot: Robert M. Walker, Acting Secretary of the Army; Colonel Marvin Nickels, Commandant, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas; and Colonel Gatrell, Commander, Munson Army Hospital, Fort Leavenworth, Kansas.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 48 M.J. 84. The order of the Air Force Court of Criminal Appeals (App., *infra*, 22a-24a) is unreported. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction (App., *infra*, 30a-38a) is unreported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998. On July 21, 1998, Chief Justice Rehnquist

extended the time within which to file a petition for a writ of certiorari to and including August 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are reproduced at App., *infra*, 39a-42a.

STATEMENT

Following trial by a general court-martial, respondent was convicted of willfully disobeying a "safe sex" order from a superior officer, assault with means likely to produce death or grievous bodily harm, and assault consummated by a battery, in violation of Articles 90 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 890, 928. He was sentenced to six years' confinement and forfeiture of $2,500 pay per month for 72 months. The Air Force Court of Criminal Appeals affirmed the conviction, and respondent sought no further review of that decision. The Air Force then initiated action to drop respondent from the rolls of the Air Force because of his court-martial conviction and sentence. On respondent's application, the Court of Appeals for the Armed Forces issued an extraordinary writ under the All Writs Act, 28 U.S.C. 1651(a), barring the President from dropping respondent from the rolls of the Air Force.

1. The President, as Commander in Chief of the Armed Forces, commissions all officers of the military. U.S. Const., Art. II, § 3. Since 1870, the President also has had the authority to drop from the rolls of the Army any officer who has been absent from duty for three months without leave. Act of July 15, 1870, ch. 294, § 17, 16 Stat. 319. In 1911, Congress extended the

President's authority to drop from the Army's rolls officers who have been absent in confinement in a prison or penitentiary after final conviction by a civilian court. Act of Jan. 19, 1911, ch. 22, 36 Stat. 894; see also Act of Apr. 2, 1918, ch. 39, 40 Stat. 501 (authorizing President to drop from the rolls of the Navy and Marine Corps officers who have been absent from duty without leave for three months or more or found guilty by civilian authorities of any offense); Act of May 5, 1950, ch. 169, § 10, 64 Stat. 146 (authorizing President to drop from the rolls "of any armed force" officers who have been absent without authority for at least three months or finally sentenced to confinement in a Federal or State penitentiary or correctional institution).

On February 10, 1996, as part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. XI, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, codified at 10 U.S.C. 1161(b)(2) and 1167, Congress expanded the President's authority to drop officers from the rolls. Section 1161(b)(2) authorizes the President to "drop from the rolls of any armed force any commissioned officer * * * who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial." 10 U.S.C. 1161(b)(2). Section 1167 in turn provides that "a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final * * * and the member has served in confinement for a period of six months." 10 U.S.C. 1167.

2. Respondent is a commissioned officer in the United States Air Force serving in the rank of Major. After he was diagnosed as HIV-positive, his superior commissioned officer ordered him to inform sexual partners of his HIV status and to employ methods,

including condoms, to prevent the transfer of bodily fluids during sexual relations. App., *infra*, 31a. Respondent nevertheless had unprotected vaginal intercourse with a fellow officer and a civilian without informing them that he was HIV-positive. Respondent was thereafter tried by general court-martial on two specifications of willfully disobeying a "safe sex" order from a superior officer, two specifications of assault with a means likely to produce death or grievous bodily harm, and one specification of assault on a superior commissioned officer, in violation of 10 U.S.C. 890 and 928. Respondent was convicted as charged, except that he was acquitted of assault on a superior officer and instead convicted of the lesser-included offense of assault consummated by battery. On March 4, 1994, respondent was sentenced to six years' confinement and forfeiture of $2,500 pay per month for 72 months. On November 20, 1995, the Air Force Court of Criminal Appeals affirmed the conviction. Respondent did not seek further review of that decision, and his conviction therefore became final. See 10 U.S.C. 867(b); Rule 1209(a) of the Rules for Courts-Martial. Respondent was incarcerated at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. App., *infra*, 2a.

On or before December 18, 1996, the Air Force notified respondent that it had initiated action under Section 1161(b)(2) to drop him from the rolls of the Air Force on the basis of his final court-martial conviction and confinement. App., *infra*, 25a-29a. On December 20, 1996, while serving in confinement, respondent petitioned the Air Force Court of Criminal Appeals for extraordinary relief under the All Writs Act, 28 U.S.C. 1651(a), alleging that his receipt of HIV medication had been interrupted. On January 9, 1997, the Air Force Court of Criminal Appeals denied the petition for lack

of jurisdiction. App., *infra*, 22a-24a. On January 23, 1997, respondent filed a combined Petition for Extraordinary Relief and Writ Appeal in the United States Court of Appeals for the Armed Forces, reiterating his claims with regard to his medication, and arguing for the first time that the Air Force's action to drop respondent from its rolls violated the Double Jeopardy and *Ex Post Facto* Clauses. Respondent argued that because his court-martial conviction triggered the Air Force's action to drop him from the rolls, Sections 1161(b)(2) and 1167, which were enacted after his conviction, imposed an *ex post facto* punishment. He similarly contended that the provisions violated the Double Jeopardy Clause because they authorized the infliction of successive punishment based on the same conduct underlying his conviction. App., *infra*, 13a; Resp. C.A. Br. A1-6 to A1-9.

On August 25, 1997, the court of appeals issued an order staying any administrative action to drop respondent from the rolls. App., *infra*, 20a-21a. In October 1997, respondent's sentence expired and he returned to duty status.

3. The court of appeals denied respondent's writ-appeal petition as moot and, by a three-to-two vote, granted his petition for extraordinary relief barring the President from taking action to drop respondent from the rolls. App. *infra*, 1a-19a. The court of appeals rejected the Air Force's contention that the court lacked All Writs Act jurisdiction to entertain respondent's requests for extraordinary relief because the challenged matters constitute "administrative actions which are separate and apart from the processing of any matter against [respondent] under the Uniform Code of Military Justice." Gov't C.A. Br. 9. The court of appeals noted that its earlier decisions had recognized a "broad responsibility with respect to admini-

stration of military justice," and had found jurisdiction to review via the All Writs Act "a case that [the court] cannot possibly review directly." App., *infra*, 5a-6a. The court concluded that it is thus "empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court." *Id.* at 6a.

The court then held that respondent at least initially was entitled to bring a writ-appeal petition raising his medical treatment claim, even though his "release from confinement has now mooted his claim." App., *infra*, 8a. The court further found that respondent's failure to raise in the Court of Criminal Appeals his challenge to the Air Force's personnel action was not fatal to the court of appeals' jurisdiction. The court explained that, "consistent with the concept of 'pendent jurisdiction,'" respondent's "proper filing in this Court of a writ-appeal petition as to suspension of necessary medications allowed him to 'piggyback' thereon * * * the issue of lawfulness of dropping him from the rolls of the Air Force." *Id.* at 9a.

Turning to the merits of respondent's challenge to Sections 1161 and 1167, the court of appeals acknowledged that the President's statutory authority to drop an officer from the rolls is "not labeled 'punishment,'" but "[i]nstead * * * is part of a chapter of Title 10 which concerns 'Personnel.'" App., *infra*, 14a. Nevertheless, the court held that, "[a]lthough the issue is a close one, * * * in order fully to accomplish the purposes of the *Ex Post Facto* and Double Jeopardy Clauses," the Air Force's action to drop respondent from the rolls based on a court-martial conviction should be treated as "punitive." *Ibid.* The court explained that Congress enacted Sections 1161 and 1167 as part of the same public law that added Article

58b, 10 U.S.C. 858b, which mandates the forfeiture of military pay following a prescribed sentence imposed by court-martial. App., *infra*, 14a. The court also observed that in *United States* v. *Gorski*, 47 M.J. 370 (C.A.A.F. 1997), it had held that Article 58b is a punitive sanction under the UCMJ that is subject to the *Ex Post Facto* Clause. App., *infra*, 13a. The court further reasoned that an action to drop an officer from the rolls involves a "stigma very akin to that involved in 'punishment.'" *Id.* at 14a. The court of appeals therefore held that "under all the circumstances surrounding enactment of Pub. L. No. 104-106, the provision for 'dropping from the rolls' was 'punitive' for purposes of the Double Jeopardy Clause and, *a fortiori*, for purposes of the *Ex Post Facto* Clause." *Id.* at 15a n.10. In a footnote, the court stated that those same statutory "circumstances" also sufficed to distinguish *Hudson* v. *United States*, 118 S. Ct. 488 (1997), in which this Court had found that an occupational debarment sanction imposed on individuals administratively for their banking violations did not constitute "punishment" under the Double Jeopardy Clause. App., *infra*, 15a n.10.

Judges Cox and Sullivan filed separate concurrences. App., *infra*, 15a-17a. Judge Cox wrote to respond to the dissent's criticism that the court lacked jurisdiction under the All Writs Act to review an "administrative action" to drop an officer from the rolls. App., *infra*, 15a. In his view, the court's "jurisdiction extends only to the Constitutional *ex post facto* question." *Id.* at 16a. Judge Sullivan emphasized the court's "responsibility of protecting the rights of all servicemembers in court-martial matters," especially "when a 'second punishment,' directly tied to [a] court-martial, is imposed * * * by an *ex post facto* law." *Id.* at 17a.

Judge Gierke, joined by Judge Crawford, dissented. App., *infra*, 17a-19a. They observed that "[d]ropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial," and unlike the provision at issue in *United States* v. *Gorski*, *supra*, "[Section] 1167 is not part of the Uniform Code of Military Justice but, instead, is part of the United States Code pertaining to personnel matters." App., *infra*, 17a-18a. In their view, dropping an officer from the rolls is purely an "administrative personnel decision, in the same category as a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance." *Id.* at 19a. Thus, Judges Gierke and Crawford would have held that the court lacked jurisdiction to review the Air Force's action to drop respondent from the rolls. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals invalidated on constitutional grounds an Act of Congress authorizing the President to drop an officer from the rolls of the armed forces based on the officer's final conviction by court-martial. That holding conflicts with this Court's decisions, which recognize that the Double Jeopardy and *Ex Post Facto* Clauses apply only to *criminal* laws. It also conflicts with the decisions of the circuit courts of appeals, which have held that a servicemember's administrative discharge from the military is not a criminal proceeding implicating double jeopardy concerns. The holding deprives the President of an administrative procedure for removing from military duty officers who have been incarcerated for committing serious crimes and thus either are unavailable for useful military service or whose continued service would be incompatible with

the military's standards of conduct for officers. The court of appeals' decision is also flawed in holding that the All Writs Act provides a jurisdictional basis for the court to review the constitutionality of an administrative personnel action. Congress specifically limited the jurisdiction of the Court of Appeals for the Armed Forces to direct review of certain court-martial cases. The court's expansion of its jurisdiction beyond those limits and into military personnel matters conflicts with the language of the All Writs Act and the Court's precedents limiting the applicability of the Act to cases within a court's jurisdiction. Accordingly, this Court's review is warranted.

1. The court of appeals lacked jurisdiction over respondent's challenge to the constitutionality of Sections 1161(b)(2) and 1167. The Court of Appeals for the Armed Forces (formerly, the Court of Military Appeals) is an Article I court whose jurisdiction is limited to court-martial cases reviewed by a Court of Criminal Appeals involving specific types of sentences: a sentence of death; a sentence including dismissal of a commissioned officer; a sentence including the punitive discharge of an enlisted servicemember; or a sentence to confinement for one year or more. 10 U.S.C. 866(b), 867(a); *Weiss* v. *United States*, 510 U.S. 163, 168 (1994); *Parisi* v. *Davidson*, 405 U.S. 34, 41 n.7, 44 (1972). The Court of Appeals for the Armed Forces thus "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. 867(c).

There is no dispute that the court of appeals lacked jurisdiction under 10 U.S.C. 867 to hear respondent's challenge to the Air Force's personnel action to drop him from the rolls; that action is not part of a sentence adjudged by a court-martial. Nor does the court of

appeals have jurisdiction over respondent's challenge pursuant to the All Writs Act, 28 U.S.C. 1651(a). That Act authorizes courts to issue writs "in aid of their respective jurisdictions," 28 U.S.C. 1651(a). That language means that courts may issue writs only in cases otherwise within their jurisdiction; it does not expand the bases for jurisdiction. See *Pennsylvania Bureau of Correction* v. *United States Marshals Serv.*, 474 U.S. 34, 41 (1985) (Act does not authorize review "where jurisdiction [does] not lie under an express statutory provision"); see also *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 601 (1821) (the Act "vest[s] the power * * * in cases where the jurisdiction already exists"); *Jackson* v. *Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993) ("An order is not authorized under the Act unless it is designed to preserve jurisdiction that the court has acquired from some other independent source in law.").[1] Accordingly, the court of appeals erred in invoking the All Writs Act "in a case that it cannot possibly review directly." App., *infra*, 6a.

The court of appeals has asserted a broad, and erroneous, view of its All Writs Act authority in a number of cases that fall outside the limits of 10 U.S.C. 867. See, *e.g.*, *Fletcher* v. *Covington*, 42 M.J. 215 (C.A.A.F. 1995) (issuing stay in Article 15 proceedings over which court of appeals has no jurisdiction); *Unger*

[1] This Court therefore has recognized "the power of the Court of Military Appeals to issue an emergency writ * * * in cases * * * which may ultimately be reviewed by that court," and cautioned that "[a] different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes." *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969); cf. *Parisi* v. *Davidson*, 405 U.S. at 44-45 (noting "conceptual difficulty" with Court of Military Appeals' jurisdiction under the All Writs Act to consider a servicemember's claim for discharge from the military as a conscientious objector).

v. *Ziemniak*, 27 M.J. 349, 351 (C.M.A. 1989) (exercising jurisdiction over special court-martial while acknowledging that case does not "qualify for review" under 10 U.S.C. 867); *United States Navy-Marine Corps Court of Military Review* v. *Carlucci*, 26 M.J. 328, 330-334 (C.M.A. 1988) (reviewing Department of Defense Inspector General's judicial corruption investigation); see also App., *infra*, 5a n.3. The effect of that expansive and incorrect view is to propel the court of appeals into military personnel matters over which it has no proper cognizance.

Here, respondent sought extraordinary relief from the Air Force's *personnel* action to drop him from the rolls, which was not part of respondent's sentence imposed by court-martial. Indeed, respondent brought his petition against the President, the Secretary of Defense, and other officials who were not even parties to the court-martial, and he sought relief after his court-martial conviction had become final through the lapse of time to appeal under 10 U.S.C. 867(b). See also 10 U.S.C. 1167 (authorizing separation only "after the sentence to confinement has become final under [the UCMJ]"). Accordingly, the court of appeals' writ preventing the Air Force from dropping respondent from its rolls was not "necessary or appropriate in aid of" the court's limited jurisdiction under 10 U.S.C. 867 to review court-martial convictions. While the court has said that it has "broad responsibility with respect to administration of military justice," App., *infra*, 5a, no such general view of its mission can authorize it to overrun statutory limits on its jurisdiction.[2]

[2] The breadth of the court's view of its All Writs Act power is underscored by its assertion of jurisdiction over respondent's challenge to the Air Force's personnel action based on a theory that such a claim is "pendent" to respondent's claim that he

Under the jurisdictional theory applied in this case, the Court of Appeals for the Armed Forces could review any servicemember's challenge to a personnel action, such as a loss of a security clearance or non-selection for promotion, as long as the servicemember claims that he is being sanctioned for conduct for which he was previously convicted by a court-martial. The court's holding thus permits it to adjudicate constitutional claims that arise not from the court-martial itself, but from collateral consequences of the conviction within the military. Such an expansive concept of jurisdiction conflicts with Congress's assignment of the responsibility for reviewing such claims to the federal district courts or the Boards for Correction of Military Records under 10 U.S.C. 1552. See generally *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983); *Holley* v. *United States*, 124 F.3d 1462 (Fed. Cir. 1997); *Guerra* v. *Scruggs*, 942 F.2d 270 (4th Cir. 1991).

2. a. On the merits, the court of appeals erred in holding that an action to drop an officer from the rolls on the basis of a prior conviction was "punitive" for

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received improper medical treatment while in confinement. App., *infra*, 9a. As an initial matter, the court of appeals lacked jurisdiction over respondent's medical treatment claim, because the court may act only with respect to "the findings and sentence as approved by the convening authority." 10 U.S.C. 867(c). Moreover, respondent's conviction was already final at the time of the filing of the petition for extraordinary relief. In any event, respondent's challenge to the constitutionality of 10 U.S.C. 1161(b) and 1167, which petitioner raised for the first time in the court of appeals, is not sufficiently related to his challenge to his medical treatment to constitute a pendent claim. See generally *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 51 (1995); *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966); cf. 28 U.S.C. 1367(a) (providing for supplemental jurisdiction over pendent claims and parties when claims are "so related * * * that they form part of the same case or controversy").

purposes of the Double Jeopardy and *Ex Post Facto* Clauses. Those Clauses apply to only criminal laws or proceedings. *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997) ("We have long recognized that the Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, in common parlance, be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense.") (internal quotations marks and citation omitted); *Kansas* v. *Hendricks*, 117 S. Ct. 2072, 2081 (1997) (Double Jeopardy and *Ex Post Facto* Clauses apply to "criminal proceedings"); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952) ("It has always been considered that [the *Ex Post Facto* Clause] forbids * * * penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment."); see also *Calder* v. *Bull*, 3 U.S. (3 Dallas) 386, 390 (1798).

As this Court recently made clear, the question whether a particular sanction is criminal or civil is initially a matter of legislative intent. *Hudson*, 118 S. Ct. at 493. If the legislature intends to create a civil sanction, that is the end of the matter unless there is "the clearest proof" that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Ibid.* (internal quotation, brackets, and citations omitted); see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2081-2082; *United States* v. *Ursery*, 518 U.S. 267, 288 (1996); *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). In conducting the latter inquiry, the factors identified in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and subsequent cases provide guidance; those factors include whether the sanction historically has been regarded as punishment; whether it involves an affirmative disability or re-

straint; whether it promotes the traditional goals of punishment; and whether it is proportionate to a non-punitive purpose. See, *e.g.*, *Hudson*, 118 S. Ct. at 495-496; *Kansas* v. *Hendricks*, 117 S. Ct. at 2082-2083. The fact that the conduct being sanctioned may also constitute a crime or that the sanction was intended to deter similar conduct "is insufficient to render a sanction criminal." *Hudson*, 118 S. Ct. at 496; see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2082; *Ursery*, 518 U.S. at 292.

b. Under that analytical framework, an action to drop an officer from the rolls is not a punitive measure subject to double jeopardy and *ex post facto* restrictions. Congress clearly intended 10 U.S.C. 1161(b)(2) and 1167 to be a civil remedy. Sections 1161(b)(2) and 1167 are not contained in the Uniform Code of Military Justice, 10 U.S.C. 801-946. See App., *infra*, 14a. Instead, Sections 1161 and 1167 are included in Chapter 59 of Title 10 of the U.S. Code, which is entitled "Separation" and concerns military personnel matters. Before 1996, Section 1161 had authorized the President to drop from the rolls officers absent without leave or convicted by a civilian court. In 1996, Congress amended Section 1161 and enacted Section 1167 to extend that authority to certain officers convicted by courts-martial; it did so as part of Title V of the National Defense Authorization Act for Fiscal Year 1996, which is entitled "Military Personnel Policy." Pub. L. No. 104-106, 110 Stat. 290; see also App., *infra*, 3a (referring to Air Force's "*administrative* action to drop [respondent] from its rolls") (emphasis added). Congress's classification of an action to drop officers from the rolls as an administrative personnel action, rather than as a feature of a court-martial sentence under the UCMJ, reveals that Congress regarded that action to be civil in character. See *Kansas* v. *Hendricks*, 117 S. Ct. at 2082 (Kansas's placement of involuntary commitment proceedings in State's "probate code, instead of the criminal code" supported finding that legislature intended proceedings to be civil). Contrary to the court of appeals' view, it does not matter that this civil provision was enacted simultaneously with the provision that the court of appeals regarded as punitive. App., *infra*, 14a. Congress frequently provides both a civil and a criminal sanction for the same conduct. *Helvering* v. *Mitchell* 303 U.S. 391, 397-398 (1938) (no double jeopardy bar to civil and criminal sanction for tax evasion); cf. *FDIC* v. *Mallen*, 486 U.S. 230 (1988) (rejecting due process challenge to suspension of indicted bank officer).

There is no indication, much less "the clearest proof," *Hudson*, 118 S. Ct. at 493; *Kansas* v. *Hendricks*, 117 S. Ct. at 2082, that an action to drop an officer from the rolls is so punitive in purpose or effect as to negate Congress's intent to establish a civil, administrative scheme. In *Hudson*, the Court held that occupational debarment from the banking industry for banking violations was not punitive. 118 S. Ct. at 495. The same conclusion applies here. Dropping from the rolls has historically been regarded as remedial. It has long been recognized that "[t]he authority to drop is a special power conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered." William Winthrop, *Military Law and Precedents* 746 (2d ed. 1920); see also 36 Op. Atty. Gen. 186, 188 (1930) (the purpose of an action to drop an officer from the rolls is "not to impose additional punishment upon naval officers convicted of crime, but rather to promote the efficiency of the Navy and to maintain the high standard of its officer personnel by providing that

officers who fail to maintain a certain standard of conduct may be dropped from the rolls and rendered ineligible for reappointment").

Moreover, in extending the conditions under which officers may be dropped from the rolls to include confinement for an extended period following a final court-martial conviction, Congress reasonably furthered the legitimate remedial objective of separating officers who are not performing any service for the military (because they are in confinement) or whose continuation in active service is inconsistent with good order and discipline. Dropping from the rolls imposes no affirmative disability or restraint "approaching the 'infamous punishment' of imprisonment." *Hudson*, 118 S. Ct. at 496 (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)). And an administrative action to drop an officer from the rolls carries with it no characterization as to the conditions under which the officer was separated. It removes a person from the rolls of the military, without the stigma associated with criminal punishment. See App., *infra*, 26a (notifying respondent that his "service will not be characterized"); see also *Helmich* v. *Nibert*, 543 F. Supp. 725, 728 (D. Md. 1982) ("[S]eparation * * * by dropping * * * from the rolls * * * is clearly not equivalent to a discharge. It is purely a non-disciplinary administrative action which carries no connotations, good or bad.") (citation omitted).

The court of appeals' treatment of dropping from the rolls as "punishment" conflicts with the consistent view of the circuit courts of appeals that have held that a servicemember's discharge from the military is not criminal punishment. See *United States* v. *Rice*, 109 F.3d 151, 153 (3d Cir. 1997) (rejecting defendant's claim that a "general discharge was punishment and the functional equivalent of a criminal prosecution barring

subsequent prosecution for the same offense"); *United States* v. *Smith*, 912 F.2d 322, 323-324 (9th Cir. 1990) (rejecting claim that administrative discharge in lieu of court-martial barred subsequent criminal charges arising out of same conduct); cf. *United States* v. *Reyes*, 87 F.3d 676, 680 (5th Cir. 1996) (in rejecting double jeopardy challenge to conviction following civilian employee's suspension from military, court held "constitutional restrictions on governmental action in its capacity as an employer are not a persuasive basis on which to hold that 'punishment' for Double Jeopardy Clause purposes embraces adverse employment action taken by the government in its capacity as employer, rather than as sovereign"). In ruling that the Constitution forbids the President from dropping from the rolls officers who have been previously convicted of a crime, the Court of Appeals for the Armed Forces has departed from the uniform course of lower court decisions.

3. The constitutional principle embraced by the court of appeals not only conflicts with the Court's longstanding jurisprudence under the Double Jeopardy and *Ex Post Facto* Clauses; it also imposes an unwarranted intrusion upon the President's authority, as Commander in Chief, to enforce standards of behavior for those who serve as officers in the armed forces. The court of appeals' decision prevents the President from dropping from the rolls an officer who has committed a serious crime and thereby eliminates a basic tool provided by Congress to deal with the presence of a convicted officer in the military's leadership ranks.

Although the court of appeals' decision expressly prohibits only an action to drop an officer from the rolls, its reasoning has broader implications that could affect the military's ability to discharge any servicemember

on the basis of a prior court-martial conviction. A commissioned officer who is convicted in a court-martial and sentenced to more than six months' imprisonment is frequently given a sentence of dismissal. See Rule 1003(b)(9)(A) of the Rules for Courts-Martial (authorizing sentence including dismissal). Where a sentence of dismissal is not imposed, however, the military may initiate either an action to drop from the rolls or an administrative discharge proceeding under 10 U.S.C. 1181(b), which also results in the loss of military pay and status. There are distinctive substantive and procedural features of administrative discharge proceedings that underscore their remedial role in maintaining standards of conduct for military servicemembers.[3] Those features may lead the court of appeals to exempt administrative discharge proceedings from double jeopardy scrutiny. Nevertheless, given the court's broad reasoning that respondent's termination of military status and pay would be unconstitutional because it "result[s] from punitive action taken pursuant to the UCMJ," App., *infra*, 14a, the court may well extend its ruling in this case beyond an action to drop from the rolls under Section 1161(b)(2).

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[3] Section 1181 permits separation of officers because of "misconduct" or "moral or professional dereliction" or because the officer's "retention is not clearly consistent with the interests of national security." 10 U.S.C. 1181(b). The armed forces may employ similar administrative mechanisms to discharge enlisted members for misconduct. 10 U.S.C. 1169 (authorizing Secretary of an armed force to prescribe regulations for discharge of enlisted members); 32 C.F.R. Pt. 41, App. A. After the court of appeals stayed the Air Force's action to drop respondent from the rolls under Section 1161(b)(2), but before the court of appeals issued its decision, the Air Force instituted an administrative discharge proceeding against respondent under Section 1181. The military has deferred that proceeding pending the resolution of this case.

Even if the court of appeals does not extend its ruling to prohibit an administrative discharge proceeding under Section 1181 against respondent and other similarly situated officers, an administrative discharge proceeding is more cumbersome, time-consuming, and resource-intensive than an action to drop an officer from the rolls.[4] The court's decision thus impairs the President's ability to remove promptly an officer whose authority in the military chain of command has been undermined and whose service no longer furthers the military mission. See *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983) (noting that "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting" and that "the established relationship between enlisted military personnel and their superior officers * * * is at the heart of the necessarily unique structure of the Military"); *Parker* v. *Levy*, 417 U.S. 733, 744 (1974) (recognizing that "a military officer holds a particular position of responsibility and command in the Armed Forces").

The court of appeals' holding raises matters fundamental to the administration of military personnel matters. Great deference is owed to the judgments of the political branches in this area. See, *e.g.*, *Weiss*, 510 U.S. at 177 (1994) ("Judicial deference * * * 'is at its apogee' when reviewing congressional decisionmaking"

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[4] For instance, an action under Section 1181 generally requires an evidentiary hearing before a convened Board of Inquiry during which the officer has a right to counsel and subsequent consideration by a Board of Review. 10 U.S.C. 1182-1185; Air Force Instruction 36-3206, Chs. 7-8 (Oct. 14, 1994). By contrast, an action to drop an officer from the rolls is a summary procedure in which the officer is notified of the action and has "10 calendar days to submit comments on his or her defense." Air Force Instruction 36-3207, Ch. 4.2.3 (May 29, 1997).

in the military context) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)); *Loving* v. *United States*, 517 U.S. 748, 768-773 (1996). Despite that principle, the Court of Appeals for the Armed Forces, an Article I court, has invalidated on constitutional grounds an Act of Congress exercising the Legislative Branch's power under the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14—and did so by extending its reach to personnel matters that fall outside the court's limited jurisdiction. Those holdings warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

Misc. No. 97-8012
Crim.App. Misc. No. 96-14

JAMES T. GOLDSMITH, MAJOR,
U.S. AIR FORCE, PETITIONER/APPELLANT,

v.

PRESIDENT WILLIAM J. CLINTON;
SECRETARY OF DEFENSE WILLIAM S. COHEN;
ACTING SECRETARY OF THE AIR FORCE F. WHITTEN PETERS; ACTING SECRETARY OF THE ARMY ROBERT M. WALKER; LIEUTENANT GENERAL JOHN C. GRIFFITH, VICE COMMANDER, HQ AIR EDUCATION AND TRAINING COMMAND, RANDOLPH AIR FORCE BASE, TEXAS; COLONEL MARVIN NICKELS, COMMANDANT, U.S. DISCIPLINARY BARRACKS, AND COLONEL GATRELL, COMMANDER, MUNSON ARMY HOSPITAL, BOTH OF FORT LEAVENWORTH, KANSAS,
RESPONDENTS/APPELLEES

[Argued: Nov. 3, 1997
Decided: April 29, 1998]

Opinion of the Court

EVERETT, Senior Judge:

As a result of Major Goldsmith's participation in unprotected vaginal intercourse with two women—a fellow officer and a civilian—while he was HIV-positive, he was tried by general court-martial on two specifications of willfully disobeying a "safe sex" order from a superior officer, two specifications of assault with a means likely to produce death or grievous bodily harm, and one specification of assault on a superior commissioned officer. *See* Arts. 90 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 928, respectively. Contrary to his pleas, he was found guilty as charged, except that he was acquitted of assault on a superior officer and instead convicted of the lesser-included offense of assault consummated by a battery. His sentence was confinement for 6 years and forfeiture of $2,500.00 pay per month for 72 months. Under this sentence, which the convening authority approved as adjudged, Goldsmith was to remain in confinement as an Air Force officer for 6 years, less any subsequent remission of sentence or credit for good behavior, and he was to receive his regular monthly pay and allowances as a major, less the forfeitures imposed by the court-martial.

The Court of Criminal Appeals affirmed the findings and sentence of the court-martial, but Major Goldsmith did not petition this Court for review. Subsequently, on December 20, 1996, his counsel filed with the Court of Criminal Appeals a pleading styled "Writ Appeal Petition for Extraordinary Relief" and a "Brief to Support Writ Appeal Petition for Extraordinary Relief." The gravamen of this "petition" was that, at the Fort Leavenworth Disciplinary Barracks where Goldsmith was serving his sentence, an interruption had occurred in his receipt of an HIV medication. Petitioner's counsel represented then—as he also did during oral argument in our Court—that the failure to receive the medication was life-threatening.

On January 9, 1997, the Court of Criminal Appeals denied the petition by *per curiam* opinion. Two weeks later, Major Goldsmith filed with this Court the combined Petition for Extraordinary Relief and Writ Appeal now being considered. Therein, he not only reiterated his request that he be assured a continuous supply of HIV medication while in confinement, but he also asked this Court to prevent his being dropped from the rolls of the Air Force pursuant to the provisions of a recently enacted law. *See* 10 U.S.C. §§ 1161 and 1167. Petitioner named as respondents the President and various other members of the Executive Branch.

Soon after receiving the petition, this Court entered an order directing the deferral of any administrative action to drop petitioner from the rolls. Then the Court heard argument on the petition with respect to the issue of the constitutionality of applying to Major Goldsmith a statute which was enacted after his offenses had been committed and also after the adjudging of his sentence. During the argument, we were informed by petitioner's counsel that he had been released from confinement and is now performing duty as a commissioned officer while the Air Force prepares to proceed with administrative action to drop Goldsmith from its rolls whenever this Court allows it to do so.

I

A

At the outset, the Government contests Major Goldsmith's right to petition this Court for extraordinary relief concerning his sentence, the conditions under which it is served, or the threatened dropping from the rolls. In this connection, the Government emphasizes that Major Goldsmith never petitioned this Court for discretionary review under Article 67, UCMJ, 10 U.S.C. § 867; and it suggests that because of this omission, he is now barred from invoking this Court's jurisdiction.

Our interpretation of the All Writs Act, 28 U.S.C. § 1651(a), is broader than the Government's. Thus, in *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989), we considered a writ-appeal petition that had been submitted by a naval officer being tried by special court-martial. That case could never have reached this Court on direct review because a special court-martial is not empowered to adjudge for an officer a sentence which is eligible for direct review by a Court of Criminal Appeals under Article 66, UCMJ, 10 U.S.C. § 866,[1] and therefore the case could not be

[1] Under Article 66(b)(1), "The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. . . ." Special courts-martial may not adjudge "death, dishonorable discharge, dismissal, confinement for more than six months. . . ." Art. 19, UCMJ, 10 U.S.C. § 819.

directly reviewed by this Court under Article 67.[2] Our premise in *Unger*, as well as in several other cases,[3] was that Congress intended for this Court to have broad responsibility with respect to administration of military justice.

[2] Article 67 only provides for review by this Court of cases which have been reviewed by a Court of Criminal Appeals.

[3] *See, e.g., United States v. Hardy*, 17 U.S.C.M.A. 100, 37 C.M.R. 364, 1967 WL 4264 (1967) (a petition for review of the validity of a conviction by direct appeal was outside the scope of Article 67); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 151-52, 36 C.M.R. 306, 307-08, 1966 WL 4467 (1966) (Article 67 does not describe the full powers of this Court; rather, the Court also possesses incidental powers as part of its responsibility under the UCMJ to protect the constitutional rights of members of the armed forces); *Gale v. United States*, 17 U.S.C.M.A. 40, 42, 37 C.M.R. 304, 306, 1967 WL 4245 (1967) (Congress intended to grant this Court "supervisory power over the administration of military justice," as well as the authority in certain circumstances to grant relief in pending court-martial proceedings); *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10, 1968 WL 5042 (1968) (this Court has the power to grant relief on an extraordinary basis to protect the constitutional rights of servicemembers); *McPhail v. United States*, 1 M.J. 457, 460 (C.M.A. 1976) ("[A]n accused who has been deprived of any fundamental right under the Uniform Code 'need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary'"); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (this Court granted extraordinary writ directing military judge to dismiss charges and deny authorities the right to prosecute appellant by court-martial as a result of due process violation); *United States Navy-Marine Corps. Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988) (Because this Court is removed from the influences of the Department of Defense and has the power to freely question executive regulation or action, it therefore possesses extraordinary-writ jurisdiction to address unlawful command influence originating with a civilian).

Keeping *Unger* in mind, we conclude that, if this Court is empowered to grant extraordinary relief in a case that it cannot possibly review directly, it is also empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court. Moreover, in our view, Goldsmith's failure to petition this Court for discretionary review pursuant to Article 67 did not waive or otherwise affect our extraordinary-writ jurisdiction in connection with this case.

B

Unlike most cases reviewed by this Court or by the Courts of Criminal Appeals, the issue that first gave rise to a petition by Goldsmith for extraordinary relief is not reflected in any way in the record of trial or in the post-trial review. Instead, that issue concerned the manner in which the sentence to confinement was being carried out. Although we doubt that Congress intended for either this Court or the Courts of Criminal Appeals to review details of prison administration, we are persuaded that not every aspect of an appellant's service of a prison sentence imposed by a court-martial is immune from review under the All Writs Act. *See United States v. Coffey*, 38 M.J. 290 (C.M.A. 1993).

For example, if a servicemember under sentence to confinement were kept in confinement by the commandant of a disciplinary barracks after that sentence, as properly computed, had been served, either our Court or the Court of Criminal Appeals would have authority to order a release from confinement, rather than require that the servicemember seek a

writ of *habeas corpus* from a federal district judge in the district where he was confined. Likewise, in view of the prohibition against "cruel or unusual punishment" specifically included in Article 55, UCMJ, 10 U.S.C. § 855, we are convinced that under the All Writs Act either this Court or the Court of Criminal Appeals can grant extraordinary relief against such punishment inflicted upon servicemembers serving a court-martial sentence to confinement—especially when the sentence adjudged was sufficient to authorize review under Articles 66 and 67. Of course, this power should be exercised sparingly because, in most instances, there will be simpler remedies available for an appellant—such as complaints under Article 138, UCMJ, 10 U.S.C. § 938, complaints to the Inspector General of the service involved, or even exercise of a servicemember's statutory right to communicate with his representative in the Congress. *Cf. United States v. Coffey, supra.*

C

In December 1996, Major Goldsmith claimed in his petition that suspension of his HIV medication was life-threatening. If such suspension of needed therapy was imposed as punishment, this would clearly seem "unusual" and probably "cruel" as well.[4] The Court of Criminal Appeals rejected the petition and, having respect for the integrity and competence of military doctors and Army hospitals, we are skeptical as to Major Goldsmith's claims of having been subjected to

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[4] Unlike the Eighth Amendment, Article 55 proscribes "cruel or unusual punishment"—although the caption of the article refers to "cruel and unusual punishments." We need not inquire in this case whether the Code's difference in phrasing has any practical significance.

vindictive or retaliatory medical treatment while he was at Fort Leavenworth. In any event, petitioner's release from confinement has now mooted his claim as to improper medical treatment. However, when he initially petitioned this Court in January 1997, the issue was still open as to whether he had been subjected to a life-endangering deprivation of medicines needed to combat his HIV-positive condition. Therefore, having previously presented that issue to the Court of Criminal Appeals as called for by our Rules of Practice and Procedure, Major Goldsmith was entitled to bring that same issue to this Court by means of a writ-appeal petition.

The Government complains, however, that unlike the issue concerning medical treatment, the issue as to the Air Force's intended dropping of Major Goldsmith from the rolls has not previously been raised in the Court of Criminal Appeals. According to the Government, a separate petition on this matter should have been submitted initially to the Court of Criminal Appeals.[5]

Although we recognize the importance of an orderly progression of a case to our Court through an intermediate court and acknowledge the great value of receiving that court's views, our rules of appellate procedure are not ironclad in that regard and specifically recognize that there may be "good cause" to

[5] Under Rule 4(b)(1), Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces, "Absent good cause, no such petition [for an extraordinary writ] shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals."

submit a petition initially to this Court.[6] Indeed, quite recently we entertained a petition by the news media for an extraordinary writ to direct that an investigation under Article 32, UCMJ, 10 U.S.C. § 832, be opened to the public, even though the petition had not been submitted previously to the Army Court of Criminal Appeals. *ABC, Inc. v. Powell*, 47 M.J. 363 (1997).

While filing in the Court of Criminal Appeals in this case was permissible and might have been preferable, we disagree with the Government's contention that it was necessary. Therefore, just as in *ABC*, we decline to require filing a new petition in the Court of Criminal Appeals or to remand the existing petition for consideration by that court. Furthermore, consistent with the concept of "pendent jurisdiction"—which on at least one occasion has been advocated by the Government, *cf. United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983)—we conclude that Major Goldsmith's proper filing in this Court of a writ-appeal petition as to suspension of necessary medications allowed him to "piggyback" thereon, by also submitting a petition for extraordinary relief to this Court, wherein he not only contested suspension of medications, but also raised initially the issue of lawfulness of dropping him from the rolls of the Air Force. *See generally United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

In *United States v. Gorski*, 47 M.J. 370 (1997), we adverted to judicial economy. Consolidation of issues

[6] In any event, our rules of appellate procedure do not limit the jurisdiction of this Court. *See* Rule 4(c).

and parties in a single proceeding is a customary way to expedite disposition of multiple issues in contention between the same parties or different parties. *Cf.* Fed. R. Civ. P. 18, 28 U.S.C. Consolidation of multistate litigation is another of many examples of this trend in the judicial process. With this in mind, we recognize that, in view of the stage of proceedings that had been reached in January 1997 as to the issue of life-endangering deprivation of medical treatment, considerable justification existed for Major Goldsmith's not filing initially in the court below his petition for extraordinary relief concerning the threatened dropping from the rolls. The All Writs Act contains no limitation of our power to consider a petition for extraordinary relief that has not been initially submitted in a Court of Criminal Appeals; and we see no reason to construe our Rules to require, in this case, a procedure that might produce delay and fragmentation.

D

The Government also claims that Major Goldsmith waited too long to submit a petition for extraordinary relief to prevent the threatened dropping from the rolls because such a petition must be filed "no later than 20 days after the petitioner learns of the action complained of." Rule 19(d) of our Rules of Practice and Procedure. According to the Government, this "action" was a notice to Major Goldsmith of the intent to drop him from the rolls.[7] This contention is somewhat at odds with the Government's contention that the issue of dropping Goldsmith from the rolls is not yet ripe for consideration by this Court and that this Court should await the taking of further administrative action. Although we recognize that it is a waste of judicial time to consider issues that are academic and may be mooted by failure to take administrative action, we also conclude that—at least by now—the Air Force's intent to drop Major Goldsmith from the rolls has been manifested sufficiently to warrant both his submission of a petition for extraordinary relief and our consideration of that petition. On the other hand, we do not believe the 20-day period prescribed by our Rules for filing the petition had run at the time it was filed in this Court.[8]

[7] Under the applicable Air Force Instruction, a notice is given to the person who is being considered for the dropping from the rolls, and that person then has 10 days to submit a response. Para. 4.2.3, Air Force Instruction 36-3207 (1 September 1996).

II

At this point, we finally encounter the substantive question of the lawfulness of applying retroactively to Major Goldsmith a statutory amendment which took effect after his trial and conviction. Pub. L. No. 104-106, 110 Stat. 186—which also created Article 58b, UCMJ, 110 U.S.C. § 858b (§ 1122, 110 Stat. 463), that this Court considered in *Gorski*—added a new ground for dropping a commissioned officer from the rolls of any armed force (§ 563(b)(1), 110 Stat. 325). Prior to enactment of the amendment, which took effect on February 10, 1996, the President was authorized to drop from the rolls any commissioned officer "who has been absent without authority for at least three months" or "who is sentenced to confinement in a

[8] In any event, the 20-day provision in our Rule does not deprive this Court of jurisdiction to consider the petition; and the All Writs Act contains no such limitation on our jurisdiction.

Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court. . . ." Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 89. After enactment of the amendment, the President could also "drop from the rolls . . . any commissioned officer . . . who may be separated under [10 U.S.C.] § 1167 . . . by reason of a sentence to confinement adjudged by a court-martial." *See* 10 U.S.C. § 1161(b)(2). Section 1167 of Title 10—which was also added by Pub. L. No. 104-106—states:

> Except as otherwise provided in regulations prescribed by the Secretary of Defense, a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final under chapter 47 of this title and the member has served in confinement for a period of six months.

§ 563(a)(1)(A), 110 Stat. 325.

Construing together §§ 1161 and 1167, we conclude that a commissioned officer sentenced by court-martial to more than 6 months' confinement may be dropped from the rolls—and thereby separated from the officer's armed force[9]—at any time after that sentence has become final, upon completion of any appellate review, and after service of confinement for

[9] According to paragraph 4.1.1, Air Force Instruction 36-3207, dropping from the rolls, in the present context, signifies termination of military status. In other contexts, dropping from the rolls may only refer to removal from the rolls of a particular unit.

6 months. Of course, termination of military status would carry with it termination of any entitlement to pay and allowances.

Major Goldsmith maintains that application to him of the statutory amendment concerning dropping from the rolls violates the *Ex Post Facto* Clause of the Constitution because it applies a new punishment to conduct that took place prior to enactment of the statute which authorized such punishment. We have considered—and upheld—in *Gorski* a similar contention with respect to Article 58b, which was also created by Pub. L. No. 104-106. We note that the double jeopardy prohibition is also involved because, as the Supreme Court has recently pointed out, "Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition [the Double Jeopardy Clause] to prevent the State from 'punishing twice, or attempting a second time to punish criminally, for the same offense.'" *See Kansas v. Hendricks*, ——U.S. ——, ——, 117 S. Ct. 2072, 2085, 138 L.Ed.2d 501 (1997), quoting *Witte v. United States*, 515 U.S. 389, 396, 115 S. Ct. 2199, 2204, 132 L.Ed.2d 351 (1995). Here, if Goldsmith's position is correct, a second "punishment" was being imposed upon him by Congress after he had already been tried and sentenced.

The Government insists that dropping from the rolls is only an "administrative" matter and does not concern punishment. This contention parallels the claim successfully made in *Hendricks* by the State of Kansas that civil commitment as a sexual predator was not "punishment" for purposes of the double jeopardy or *ex post facto* prohibitions—even though the commitment was triggered by charge or conviction of

sexually violent conduct. Certainly to some extent, *Hendricks* supports the Government's position. For example, the label of "civil" used by the Kansas legislature was significant in persuading the Supreme Court that the commitment was not designed to be punitive. —— U.S. at ——, 117 S. Ct. at 2081-82.

In the present case, the provision as to dropping from the rolls was not labeled "punishment" and, unlike the amendment considered in *Gorski*, was not included in the UCMJ. Instead, it is part of a chapter of Title 10 which concerns "Personnel." On the other hand, the amendment to 10 U.S.C. § 1161 and addition of 10 U.S.C. § 1167 are contained in the same public law that adds Article 58b and, taken in context, can be viewed as part of a package designed to deal with the same congressional concern that motivated passage of the "punitive" Article 58b. Indeed, termination of an officer's military status by dropping from the rolls—a termination resulting from punitive action taken pursuant to the UCMJ—would have the same effect of terminating pay that is imposed by Article 58b. Moreover, in terms of the context in which the recent provision for dropping from the rolls appears and the reference to dropping from the rolls in Article 4(d), UCMJ, 10 U.S.C. § 804(d), there is an associated stigma very akin to that involved in "punishment." Although the issue is a close one, we conclude that in order fully to accomplish the purposes of the *Ex Post Facto* and Double Jeopardy Clauses, we should treat this amendment as punitive and hold that it cannot be applied to Major Goldsmith.[10]

---

[10] We have considered the recent Supreme Court decision in *Hudson v. United States*, — U.S. ——, 118 S. Ct. 488, 139 L.Ed.2d 450 (1997)(holding that the Double Jeopardy Clause does not bar criminal indictment following administratively imposed monetary penalties and occupational debarment for violation of federal banking statutes because the administrative proceedings were "civil" not "criminal"), which was decided after argument of this case. Despite its relevance to the issues before us, we are still of the view that, under all the circumstances surrounding enactment of Pub. L. No. 104-106, the provision for "dropping from the rolls" was "punitive" for purposes of the Double Jeopardy Clause and, *a fortiori*, for purposes of the *Ex Post Facto* Clause.

The writ-appeal petition is denied as moot.

The petition for extraordinary relief is granted. No action may be taken to drop Major Goldsmith from the rolls pursuant to the amendment to 10 U.S.C. § 1161.

Judge EFFRON did not participate.

COX, Chief Judge (concurring):

I write only to respond to Judge Gierke's dissent. He is, of course, correct that the action of dropping an officer from the rolls of the Air Force is an "administrative action." In that sense, the issuance of a Department of Defense (DD) Form 214 to an officer who has been dismissed by a sentence of a court-martial is an administrative action. Thus, the Secretary of the Air Force may not drop an officer from the rolls in this circumstance without a sentence to confinement nor can he issue a DD Form 214 showing dishonorable service without a sentence to dismissal. Where Judge Gierke's opinion fails, in my judgment, is that he does not address the linkage between the sentence of the court-martial and the administrative action in the context of *ex post facto* laws. The only question presented by this case is whether the adoption of 10 U.S.C. § 1167 has *ex post facto* application to Major

Goldsmith. Because it was enacted many months after his court-martial sentence had been adjudged, I concur with Senior Judge Everett that as to this appellant, the application of the statute is clearly *ex post facto*.

Judge Gierke's opinion also raises significant questions in my mind. For example, if 10 U.S.C. § 1167 is purely administrative in nature, does the servicemember have recourse to the Air Force Board for Correction of Military Records to attack his court-martial conviction? Judge Gierke equates the action in this case to "a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer." Thus, I assume he would give the servicemember analogous remedies to correct administrative errors. On the other hand, perhaps Congress has created a situation where an officer is left totally exposed to the whimsical attitude of the Secretary concerned? My view is that Congress appropriately tied the Secretary concerned to the court-martial sentence with all of the attendant due process rights and judicial review.

The nexus between the court-martial process and the subsequent administrative action is so totally complete and intertwined that Congress clearly intended that the Secretary could only act under this statute pursuant to a proper conviction and sentence. Having said all of this, however, I am also convinced that once this Court has completed its review, the decision of the Secretary is totally discretionary. In this case, our jurisdiction extends only to the Constitutional *ex post facto* question. I entertain no thought of venturing beyond the limits of this

appropriate exercise of jurisdiction. *See Unger v. Ziemniak*, 27 M.J. 349, 359 (C.M.A. 1989) (Cox, J., concurring in part).

SULLIVAN, Judge (concurring):

I join the excellent opinion of my Brother, Judge Everett, and only write to highlight the fact that our Court must be accountable and responsible enough to step forward to correct the effect of this law which increased the punishment of Major Goldsmith. We should use our broad jurisdiction under the Uniform Code of Military Justice to correct injustices like this and we need not wait for another court to perhaps act. As was said in Isaiah 6:8:

> Also I heard the voice of the Lord, saying, '***Whom shall I send***, and who will go for us?' Then said I, '***Here am I; send me***.'

(Emphasis added.)

Our Court has the responsibility of protecting the rights of all servicemembers in court-martial matters. We should not shirk from this duty when a "second punishment," directly tied to his court-martial, is imposed on Major Goldsmith by an *ex post facto* law issued after his court-martial.

GIERKE, Judge, with whom CRAWFORD, Judge, joins (dissenting):

In my view 10 USC § 1167 pertains to a collateral administrative consequence of Major Goldsmith's sentence that may or may not occur. This Court has no jurisdiction over administrative personnel actions.

Unlike Articles 57 and 58, UCMJ, 10 U.S.C. §§ 857 and 858, respectively, at issue in *United States v. Gorski*, 47 M.J. 370 (1997), § 1167 is not part of the

Uniform Code of Military Justice but, instead, is part of the United States Code pertaining to personnel matters. Also unlike Articles 57 and 58, which make forfeitures and reduction mandatory, 10 U.S.C. § 1167 is merely an enabling statute for a discretionary action that may or may not occur. It merely provides that Major Goldsmith "*may* be separated." (Emphasis added.)

Dropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial. *See* Article of War 118, reprinted in Manual for Courts-Martial, U.S. Army, 1917, at 328; Article for the Government of the Navy (AGN) 38, reprinted in Naval Courts and Boards, 1937, at 465. In 1930, the Attorney General interpreted the congressional intent behind AGN 38 as

> not to impose additional punishment upon naval officers convicted of crime, but rather to promote the efficiency of the Navy and to maintain the high standard of its officer personnel by providing that officers who fail to maintain a certain standard of conduct may be dropped from the rolls and rendered ineligible for reappointment.

36 U.S. Op. Att'y Gen. 186, 188. Colonel Winthrop explained the purpose of dropping an officer from the rolls as follows:

> [T]he authority to drop is a special power conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered. . . .

W. Winthrop, *Military Law and Precedents* 746 (2d ed. 1920 reprint) (footnotes omitted).

In *Helmich v. Nibert*, 543 F. Supp. 725; 728 (D. Md. 1982), the court said that DFR "is purely a nondisciplinary administrative action which carries no connotations, good or bad. . . ." In *Pickell v. Reed*, 326 F. Supp. 1086, 1089-90 (N.D. Cal. 1971), the court drew a distinction between punitive and administrative actions and said:

> So long as an administrative discharge is not used as a disguise for punitive action, the military remains within proper bounds when it chooses to grant an administrative discharge without pressing for a court martial because of the individual's wrongful conduct.

In my view DFR is an administrative personnel decision, in the same category as a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance. It is an action that does not flow from a court-martial sentence as a matter of law. Instead, the court-martial sentence is merely the basis on which the DFR action may be based, and it may or may not occur. I believe that we have no jurisdiction to interfere. Accordingly, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Misc. Dkt. No. 97-8012/AF
Crim. App. Dkt. No. 96-14

JAMES T. GOLDSMITH (449-23-0792),
PETITIONER/APPELLANT

v.

PRESIDENT WILLIAM J. CLINTON;
SECRETARY OF DEFENSE WILLIAM COHEN;
SECRETARY OF THE AIR FORCE SHEILA WIDNALL;
SECRETARY OF THE ARMY TOGO WEST;
LT. GENERAL JOHN C. GRIFFITH,
VICE COMMANDER, HQ AIR EDUCATION &
TRAINING COMMAND, RANDOLPH AFB, TEXAS;
COLONEL MARVIN NICKLES, COMMANDANT,
U.S. DISCIPLINARY BARRACKS, AND
COLONEL GATRELL, COMMANDER,
MUNSON ARMY HOSPITAL, BOTH OF
FORT LEAVENWORTH, KANSAS,
RESPONDENTS/APPELLEES

ORDER

On consideration of petitioner's motion to stay completion of a proceeding to drop petitioner from the rolls, it is, by the Court this 25th day of August, 1997,

ORDERED;

That said motion is granted and;

That said proceeding by stayed until further order of the Court.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the
Court

Judge Effron did not participate in the disposition of this motion.

cc: The Judge Advocate General of the Air Force
Respondents
Appellate Defense Counsel (ECONOMIDY, Esq.)
Appellate Government Counsel (BRESLIN)

APPENDIX C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Misc. No. 96-14
Panel No. 1

MAJOR JAMES T. GOLDSMITH, 449-23-0792,
U.S. AIR FORCE, INMATE,
U.S. DISCIPLINARY BARRACKS,
FORT LEAVENWORTH KANSAS 66027, PETITIONER,

v.

COLONEL MARVEN NICKELS, COMMANDANT,
U.S. DISCIPLINARY BARRACKS, COLONEL
GATRELL, COMMANDER MUNSON ARMY HOSPITAL,
SECRETARY OF DEFENSE WILLIAM PERRY,
AND SECRETARY OF THE ARMY TOGO WEST,
RESPONDENT

[Jan. 9, 1997]

PETITION FOR EXTRAORDINARY RELIEF

Before: DIXON, SCHREIER, and STARR Appellate Military Judges

PER CURIAM:

Petitioner is here seeking extraordinary relief. He is currently serving a sentence of confinement at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. His conviction and sentence were affirmed by this Court on 20 November 1995. He complains that prison officials are not maintaining and administering medications which he needs as a HIV-positive inmate. Petitioner alleges that the medications had been prescribed by a military physician to enable him to combat infections. For the reasons set forth below, we decline to issue extraordinary relief.

This Court's statutory mandate under Article 66, UCMJ, is to review courts-martial in which the approved sentence includes death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more. In those cases, we may affirm only such findings of guilty or approved sentences as we find correct in law and fact.

In addition to our statutory mandate, this Court may entertain petitions for extraordinary writs in appropriate cases. Our power to grant extraordinary relief derives from the All Writs Act, 28 U.S.C. § 1651(a). That Act specifically authorizes federal courts to issue writs necessary or appropriate in aid of their respective jurisdictions. *United States v. Dettinger*, 7 M.J. 216 (C.M.A. 1979).

Unless the extraordinary relief requested involves a matter which is necessary and appropriate in aid of our statutory jurisdiction, we lack the authority to act. Having reviewed his petition, we find no authority to act on petitioner's request. Our appellate juris-

diction does not extend to the review of medical determinations made by officials at the United States Disciplinary Barracks. Accordingly, the petition is

DENIED.

[seal omitted]

OFFICIAL

/s/ ROXANE M.G. PORTER
ROXANE M.G. PORTER
Staff Sergeant, USAF
Chief Court
Administrator

APPENDIX D

[seal omitted]

DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

27 NOV 1996

MEMORANDUM FOR MAJOR JAMES T. GOLDSMITH

FROM: AETC/CV
1 F Street Suite 1
Randolph AFB TX 78150-4324

SUBJECT: Notification of Intent to Drop An Officer from the Rolls of the Air Force, Major James T. Goldsmith, 449-23-0792FR, Lackland AFB TX

1. In accordance with Section 563 of the National Defense Authorization Act of 1996 and AFI 36-3207, para 4.2.3, you are hereby notified that I am initiating action to drop you from the rolls of the Air Force.

2. I am taking this action for the following reasons:

a. On 4 Mar 94, you were convicted at a general court-martial of the following offenses:

(1) Two specifications of willful violation of Colonel John P. Tagnesi's 31 May 88 order directing you to inform your sexual partners of your HIV status before having sexual intercourse and to use proper methods, including condoms, to prevent transmission of your seminal fluids by engaging in vaginal intercourse with Ms. Debora A. Smith and 1Lt. Katherine

A. Strus. This conduct is a violation of Article 90 of the Uniform Code of Military Justice;

(2) Two specifications of assault with a means likely to produce grievous bodily harm in that you had unprotected sexual intercourse with Ms. Debora A. Smith and 1Lt. Katherine A. Strus while knowing that you were HIV positive and failing to disclose to either woman that you were infected with this disease. This conduct is a violation of Article 128 of the Uniform Code of Military Justice; and

(3) One specification of assault consummated by a battery upon 1Lt. Katherine A. Strus in her capacity as a commissioned officer in the United States Air Force. This conduct is a violation of Article 128 of the Uniform Code of Military Justice.

b. You have been in confinement for more than six months and your conviction has become final.

3. If the Secretary of the Air Force approves my recommendation, you will be discharged from the Air Force; however, your service will not be characterized. Additionally, you will not receive any discharge paperwork, you will no longer receive military pay, and you will not be eligible for any veteran benefits. You have ten calendar days from the receipt of this memorandum to submit a response. I will consider any matters you choose to submit and will forward your materials, along with my recommendation, to the SECAF who will make the final decision in this case.

4. Sign and date the attached memorandum of acknowledgment immediately upon receiving this notification memorandum. Give one copy of the acknowledgment memorandum to the officer presenting this

notification memorandum to you. If you decline to acknowledge receiving this notification memorandum, the officer presenting it to you will record the date and time that you declined to acknowledge receipt. The notification and acknowledgement memorandum will become a part of your case file.

/s/ JOHN C. GRIFFITH
JOHN C. GRIFFITH
Lieutenant General,
USAF
Vice Commander

Attachment:
Letter of Acknowledgment

[seal omitted]

DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

MEMORANDUM FOR AETC/CV

FROM: MAJOR JAMES T. GOLDSMITH, 429-23-0792FR, 37 TRS/CE

SUBJECT: Acknowledgment of Initiation of Action to Drop From Rolls of the Air Force

1. I acknowledge receiving AETC/CV's memorandum notifying me he is initiating action to drop me from the rolls of the Air Force. I received this notification at _____ on _____.

2. I understand I must endorse this acknowledgment of notification upon receipt and submit any response I care to make within ten calendar days of receipt of your notification memorandum. I also understand that if I am dropped from the rolls of the Air Force my service will not be characterized, I will not receive any discharge paperwork (including a DD Form 214),

I will no longer receive any military pay, and that I will not be eligible for any veteran benefits.

JAMES T. GOLDSMITH,
Major, USAF
449-23-0792FR

/s/ CHARLES L. HENSON
CHARLES L. HENSON,
SMSgt, USAF

APPENDIX E

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

MAJOR JAMES T. GOLDSMITH, FR449-23-0792
UNITED STATES AIR FORCE

ACM 31172

20 November 1995

Sentence adjudged 4 March 1994 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Dennis E. Kansala.

Approved sentence: Confinement for 6 years and forfeiture of $2,500 pay per month for 72 months.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain J. Knight Champion, III.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel, and Captain Timothy G. Buxton.

Before

SCHREIER, STARR, and CREGAR
Appellate Military Judges

CREGAR, Judge:

Contrary to his pleas appellant was convicted of two specifications of willful disobedience of the order of a superior commissioned officer, two specifications of assault with a means likely to inflict death or grievous bodily harm, and one specification of assault consummated by a battery.[11] Articles 90 and 128, UCMJ, 10 U.S.C. §§ 890 and 928 (1988). A general court martial consisting of members sentenced him to confinement for six years and forfeiture of $2,500 pay per month for 72 months.

Appellant received an order by a superior commissioned officer to inform his sex partners that he was HIV (human immune deficiency virus) positive before engaging in sexual relations and to employ methods, including condoms, to prevent the transfer of body fluids during sexual relations. He was convicted of the assaults and of having violated this order by engaging in unprotected sexual intercourse with two women without first informing them that he was HIV positive. He assigns three errors: that the evidence was factually insufficient to establish that there was more than a remote possibility that HIV could be transmitted through unprotected vaginal intercourse without internal ejaculation; that the military judge erred in denying a defense motion for a new Article 32 investigation; and that the sentence is inappropriately severe. Finding no merit to these assignments of error, we affirm.

---

[11] Appellant had been charged with a specification of assault on a superior commissioned officer. The members acquitted him of the greater offense and convicted him of the lesser included offense of assault consummated by a battery.

I. FACTUAL SUFFICIENCY

Appellant was diagnosed as having HIV in April 1988 and, on May 31, 1988, received the preventive medicine order described above from Colonel John P. Tagnesi, his superior commissioned officer. He also attended several counselling sessions concerning his responsibilities to inform any sex partners of his HIV status and to use protective measures if the partners consented to engage in sex with him. Persons with HIV eventually contract AIDS (Acquired Immune Deficiency Syndrome), a disease which is invariably deadly and for which there is no cure.

Appellant met Debora S in October 1988. They engaged in multiple instances of unprotected vaginal intercourse during November of 1988 and January of 1989. Appellant did not tell her that he was HIV positive. Instead, he told her that he was suffering from leukemia. The record does not establish whether appellant ever ejaculated in Ms. S's vagina.

Appellant met First Lieutenant (1st Lt) S in October 1993. They engaged in both protected and unprotected vaginal intercourse approximately 10 times. On those occasions when the intercourse was unprotected, appellant withdrew before ejaculation. At no time did he tell her that he was HIV positive. Appellant told 1st Lt. S that he was terminally ill with cancer of the lymph nodes and, in response to her direct question as to whether he was HIV positive,[12] denied that he was HIV positive. Rather, he said that "I told her I was 'false positive' once, but that's not

[12] 1st Lt. S had learned that appellant was unable to deploy world wide. Thus, it occurred to her to ask him if this was because he had AIDS.

the case anymore." 1st Lt. S did not conclude from this response that he was HIV positive. Indeed, she testified that appellant claimed that the false positive test was the result of his cancer of the lymph nodes.

There is no evidence that appellant's pre-ejaculate contained HIV. In subsequent tests neither Debora S nor 1st Lt. S has tested positive for HIV.

Appellant asserts that the evidence is factually insufficient to support his conviction for aggravated assault based on the lack of direct evidence that his pre-ejaculate fluid actually contained HIV. He relies on the expert testimony of Dr. (Major) Blatt to the effect that little is known of about the amount of HIV in pre-seminal as opposed to seminal fluid; that appellant's tests reveal that his low concentration of the virus make him less likely to have the virus in his seminal fluid; and that the risk of transmission from a male to female in vaginal intercourse is only one in one thousand. He further argues that neither Debora S nor 1st Lt. S had a coexisting sexual disease which would have increased the risk of transmission, and that neither has tested positive for HIV. Based on this evidence appellant asserts that the prosecution has failed to establish that the likelihood of infecting these two women under these circumstances was "more than merely a fanciful, speculative, or remote possibility." *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A.), *cert. denied*, 498 U.S. 919 (1990).

The test for factual sufficiency is whether, weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of this Court are themselves convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325

(C.M.A. 1987); Article 66, UCMJ, 10 U.S.C. § 866. Affirming the conviction of an HIV positive sailor who engaged in protected vaginal intercourse without informing his partner that he was HIV positive, the former Court of Military Appeals stated:

> . . . [W]e do not construe the word "likely," in the phrase, "likely to produce death or grievous bodily harm," as involving nice calculations of statistical probability. (Footnote omitted.) If we were considering a rifle bullet instead of HIV, the question would be whether the bullet is likely to inflict death or serious bodily harm *if* it hits the victim, not the statistical probability of the bullet hitting the victim. The statistical probability need only be "more than merely a fanciful, speculative, or remote possibility," *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A.), *cert. denied*, 498 U.S. 919, 111 S. Ct. 294, 112 L.Ed. 2d 248 (1990).
>
> Likewise, in this case, the question is not the statistical probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victims's body. The probability of infection need only be "more than merely a fanciful, speculative, or remote possibility." *Id.*

United States v. Joseph, 37 M.J. 392, 396-7 (C.M.A. 1993) (emphasis in original).

> In a footnote to the *Joseph* opinion the Court stated:
>
> We have held that the natural and probable consequence of having *unprotected* sexual contact with someone who tests positive for HIV is death or serious bodily harm. (Citations omitted.) Thus, deliberately exposing another to seminal fluid containing HIV is clearly a means likely to produce death or grievous bodily harm and, therefore, can be an aggravated assault.

Id. at 396, n.6 (emphasis in original).

Appellant argues that, unlike the instant case, there was expert testimony in *Joseph* that it was more than mere speculation that HIV could be transmitted through vaginal intercourse, and that Joseph knew that condoms did not provide absolute protection. He claims that he did not know nor, based on the expert testimony, was there reason to believe that his pre-ejaculate contained the virus. We disagree.

Dr. Blatt acknowledged a "probability" that not all men may have HIV in their pre-seminal fluid, and that the risk of transmission from a male to a female in unprotected intercourse is one in a thousand per encounter. However, he also stated that there is very little known about the *amount* of virus in pre-seminal fluid versus seminal fluid and that "*it is thought that the pre-seminal fluid potentially may be infectious.*" Another expert witness, Dr. (Major) Hendris, testified that it would be reckless for the withdrawal method to be used in preference to protected sex and that the risk of heterosexual, penile-vaginal transmission of HIV is a very real threat.[13]

---

[13] Indeed, there was no evidence of internal ejaculation in the single sexual encounter involved in the *Joseph* case, yet Joseph's sexual partner contracted the HIV, evidently from this single encounter. Although Joseph used a condom, it tore while he was engaging in vaginal intercourse.

Because appellant's arguments are ultimately based upon the amounts of any HIV in his pre-ejaculate and the likelihood of transmission once penetration has occurred, they in fact address the statistical probability of the transmission of the virus rather than the likelihood of death or serious bodily harm once the virus has been transmitted. These arguments are foreclosed by the holding in *Joseph*. We conclude that the "very real threat" of heterosexual HIV transmission arose when unprotected penile-vaginal penetration occurred. Accordingly, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the accused's guilt of assault with a means likely to inflict grievous bodily harm on Debora S and 1st Lt. S.

II. DENIAL OF A NEW ARTICLE 32 INVESTIGATION

Prior to the Article 32 investigation, appellant requested the presence of Debora S. The investigating officer denied the request having determined that she was unavailable because she was physically more than 100 miles away. Her testimony was, however, obtained over the telephone and the defense had the opportunity to cross-examine her. At trial the military judge denied a defense motion for a new Article 32 investigation based upon the Investigating Officer's determination. Debora S testified at the trial and was cross examined.

At no time prior to the trial did the defense request to take Debora S's deposition. Accordingly, we conclude that appellant waived this asserted error on the part of the Investigating Officer. *United States v. Chuculate*, 5 M.J. 143, 145-46 (C.M.A. 1978); *United States v. Marrie*, 39 M.J. 993, 998 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 35 (1995).

III. SENTENCE APPROPRIATENESS

Appellant is unlikely to outlive his sentence to confinement for six years with the result that he will be deprived of an opportunity to spend any portion of the brief remainder of his life with his two children in a conventional setting.

We recognize and regret the ordeal which appellant and his family face. However, the offenses for which appellant was convicted evidence a total disregard for his responsibilities as an officer and evidence a callous disregard for the lives of his sexual partners. For these offenses he could have been sentenced to a dismissal, total forfeitures, and confinement for 10 years.[14] We have also given individualized consideration to evidence of the impact of his conduct upon his sexual partners, appellant's character of service, and those matters submitted by appellant during sentencing and clemency. After consideration of these matters, we find that the sentence is not inappropriately severe. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

We conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantive rights of the appellant occurred. Accordingly, the findings of guilty and the sentence are

---

[14] The military judge determined that the Article 90 and Article 128 specifications were multiplicious for sentencing purposes.

AFFIRMED.

Senior Judge SCHREIER and Judge STARR concur.

[seal omitted]

/s/ ALVIN J. STRIBLING
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

APPENDIX F

1. Section 866 of Title 10, United States Code, provides in relevant part:

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial–

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

2. Section 867 of Title 10, United States Code, provides:

(a) The Court of Appeals for the Armed Forces shall review the record in–

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of–

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

3. Section 1161(b) of Title 10, United States Code provides:

> The President may drop from the rolls of any armed force any commissioned officer (1) who has been absent without authority for at least three months, (2) who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial, or (3) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.

10 U.S.C. 1161(b).

4. Section 1167 of Title 10, United States Code, in relevant part provides:

> Except as otherwise provided in regulations prescribed by the Secretary of Defense, a member sentenced by court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become

> final * * * and the member has served on confinement for a period of six months.

10 U.S.C. 1167.

5. Section 1651(a) of Title 28, United States Code, provides:

> The Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

6. Article I, Section 9, Clause 3, of the United States Constitution provides that "[n]o ex post facto Law shall be passed."

7. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Supreme Court, U.S.
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CLERK

No. 98-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON
PRESIDENT OF THE UNITED STATES, ET AL., PETITIONER

v.

JAMES T. GOLDSMITH, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In Section 563 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. XI, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate the military status and pay of, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. §§ 1161(b)(2), 1167. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. §§ 1161(b)(2) and 1167.

2. Whether the President's exercise of authority under 10 U.S.C §§ 1161(b)(2) and 1167 in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, reported at 48 M.J. 84 (1998), is located at Pet. for Cert. 1a-19a. The order of the United States Air Force Court of Criminal Appeals is unreported. It is located at Pet. for Cert. App. 22a-24a. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction and sentence is unreported and is located at Pet. for Cert. 30a-38a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(4).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are reproduced at Pet. for Cert. App. 39a-42a.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted except where noted.

Respondent was convicted of various offenses based on two sexual relationships occurring in 1989 and 1993. At his court-martial, respondent faced a maximum punishment of a dismissal, confinement for 10 years, forfeiture of all pay and allowances, and a fine. A dismissal would cause automatic forfeiture of Veterans Affairs (VA) benefits, such as medical care for his terminal HIV affliction. After considering the evidence and respondent's situation, the court-martial sentenced respondent on March 4, 1994 to only six years

confinement and to forfeit $2,500 pay per month for 72 months. No dismissal was adjudged.

On February 10, 1996, Congress enacted 10 U.S.C. §§ 1161(b)(2) and 1167, thereby creating a new means for the President to drop an officer from the rolls (DFR) of the Armed Forces, namely when an officer is sentenced by a court-martial to confinement for more than six months, with the sentence having become final and the member having served at least six months confinement.

On September 10, 1996, respondent was notified that he was considered but not selected for promotion to the grade of lieutenant colonel. He was also notified that he had been selected by the Major Selective Continuation Board to remain on active duty until he first became eligible to retire as an officer at 20 years of service. The Air Force informed respondent that he could accept or decline this continued active service option. If respondent declined continuation on active duty, he would receive an honorable discharge with separation pay, in addition to further benefits, such as transition assistance. On or about September 26, 1996, respondent elected to accept continuation on active duty, thus incurring a one-year active duty service commitment from the date the continuation period began.

Despite being continued on active duty, the respondent was notified on November 27, 1996 by the Air Force that it was initiating a DFR action pursuant to Section 563 of the National Defense Authorization Act of 1996 and AFI 36-3207, para 4.2.3.[1] The notification letter unequivocally

[1] The Air Force failed to amend AFI 36-3207 to provide for a DFR action against an officer serving a court-martial sentence to confinement for more than 6 months. This deficiency likewise renders infirm the November 27, 1996 DFR action against respondent.

states the DFR action would cost respondent his pay, his military status, and his VA benefits.

The pertinent VA regulation provides as follows: "[a] discharge or release because of one of the offenses specified in this paragraph is considered to have been under *dishonorable* conditions: ... (3) An offense involving moral turpitude. This includes, generally, conviction of a felony." 38 C.F.R. § 3.12(d).

REASON FOR DENYING THE WRIT

The court-martial sentence imposed on respondent on March 4, 1994 did not include such permissible punishments as a separation with ignominy, total forfeitures of pay and allowances, and loss of Veterans Affairs (VA) Department benefits, including future VA medical care for his HIV infection. A statute that went into effect over two years later (and between 3 to 7 years after the commission of his offenses) sought to release certain military prisoners as a direct sanction for their court-martial convictions, by use of a DFR action. The DFR action imposed the exact punishments that respondent avoided in his general court-martial. VA regulations stigmatize prisoners who are released under a DFR action as separated under dishonorable conditions. 38 C.F.R. §§ 3.12(c)(2), (d)(3), (k)(3). The retroactive punishment imposed by the DFR action violated the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution of the United States. Using its expertise in military matters, the Court of Appeals for the Armed Forces had jurisdiction under the All Writs Act to bar the retroactive, multiple punishment in order to insure that only the adjudged and affirmed original sentence was carried out.

1. **The Court of Appeals for the Armed Forces properly took jurisdiction over respondent's challenge to**

the constitutionality of 10 U.S.C. §§ 1161(b) and 1167 when it invoked the All Writs Act (28 U.S.C. § 1651(a)) to grant extraordinary relief. As an Article I court created by Congress, the Court of Appeals for the Armed Forces properly exercised the power given it under the All Writs Act as necessary or appropriate in aid of its jurisdiction and to exercise powers implied from the creation of this Court. 28 U.S.C. § 1651(a); *Noyd v. Bond,* 395 U.S. 683, n. 7, 89 S.Ct. 1876, 1883, 23 L.Ed.2d 631 (1969); *United States v. Frischholz,* 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966)(the then Court of Military Appeals [now Court of Appeals for the Armed Forces] noted it possesses powers incidental to and protective of those defined in Article 67, Uniform Code of Military Justice); *Dettinger v. United States,* 7 M.J. 216 (C.M.A. 1979). *See also Del Prado v. United States,* 23 U.S.C.M.A. 132, 48 C.M.R. 748 (1974)(Court of Military Appeals granted a writ of error *coram nobis* and declared accused's conviction null and void despite finality of accused's conviction, his sentence having being executed and a general discharge having been substituted for a punitive discharge even though a jurisdictional error had not been asserted or recognized when the conviction was initially reviewed and affirmed by the Court of Military Appeals); *In re Watson,* 19 U.S.C.M.A. 401, 42 C.M.R. 3 (1970)(Court of Military Appeals has jurisdiction over cases properly before it or which might come before it).

Though petitioner notes the *Noyd* Court's caution that a "different question would ... arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes", the *Noyd* Court referenced *United States v. Bevilacqua,* 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968) in its opinion. In *Bevilacqua,* the Court of Military Appeals held that it had jurisdiction to consider the petitioner's application for a writ of error *coram nobis* though petitioner's court-

martial conviction had been approved and executed by the convening authority. Furthermore, Bevilacqua's request for relief to the Air Force Board of Corrections of Military Records had twice been rejected before presenting his application of a writ of error *coram nobis.* The Court of Military Appeals concluded that it had the power to "accord relief to an accused who has palpably been denied constitutional rights in any court-martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary". *Bevilacqua,* at 12. This pronouncement was endorsed by this Honorable Court in *United States v. Augenblick,* 393 U.S. 348, 350, 89 S.Ct. 528, 530, 21 L.Ed.2d. 537 (1969); *Cf. Adams v. United States,* 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942), *reh den,* 317 U.S. 713, 87 L.Ed. 568 (1943)(unless limited by Congress, a Federal court may avail itself of all auxiliary writs as aids in performance of its duties when use of such historic aids is calculated in its sound judgment to achieve ends of justice entrusted to it). Likewise, the authority of the Court of Appeals extends to those cases that are within its appellate jurisdiction although no appeal has been perfected. *Application of President & Directors of Georgetown College, Inc.,* 118 U.S. App. D.C. 80, 331 F.2d 1000, *reh den,* 118 U.S. App. D.C. 90, 331 F.2d 1010, *cert. denied,* 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964).

The Court of Appeals for the Armed Forces was granted broad discretion by Congress to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces. *Gale v. United States,* 17 U.S.C.M.A. 40, 37 C.M.R. 304, 306 (1967). In *Gale,* the Court of Military Appeals highlighted the intent of Congress to confer upon the Court of Military Appeals a general supervisory power over the administration of military justice when it enacted

10 U.S.C. § 867. The key role envisioned by Congress in enhancing the fairness of military justice was stated in a House Report as follows:

> Article 67 contains the most revolutionary changes which have ever been incorporated into our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly on matters involving military justice.

H. Rep. No. 491, 81st Cong., 1st Sess. 6 (1949).

Likewise, the importance of military justice oversight was stressed by Mr. Brooks during the full committee hearings on H. R. 4080. Mr. Brooks stated that

> "[t]he Court of Military Appeals, which finally decides questions of law, is the court of last resort for each of the armed forces and also acts with the Judge Advocates General of the three Departments as an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

Full Committee Hearings on H. R. 3341 and H. R. 4080, 81st Cong., 1st Sess. 1328 (1949).

Thus, jurisdiction exists for the Court of Appeals to entertain respondent's petition as it directly relates to the administration of justice in the United States Armed Forces. Moreover, the Court of Appeals presents a single judicial forum for military members to assert their claims, *no matter the location of trial or confinement.* Since military members may be tried and incarcerated worldwide, Judge Sullivan correctly observed in his concurring opinion below that the

Court of Appeals for the Armed Forces should not wait for another court to perhaps act to protect the rights of all servicemembers in court-martial matters. Pet. for Cert. App. 17a.

Moreover, the exercise of jurisdiction by the Court of Appeals for the Armed Forces was proper in this case, as the court ruled upon the constitutionality of the action to drop respondent from the rolls of the Air Force as it affected and increased the punishment imposed by the decision of the court-martial. The Court of Appeals for the Armed Forces is uniquely qualified to determine the legality of actions affecting the sentence of a court-martial, as it concerns itself with the intricacies of the military justice system on a daily basis. As such, the general rule set forth by this Honorable Court that *habeas corpus* petitions from military prisoners should not be entertained by federal courts until all available remedies within the military court system have been exhausted validates the wisdom of Congress in investing the Court of Appeals for the Armed Forces with broad oversight over military justice matters. *Gusik v. Schilder,* 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146 (1950). In recognizing the need to provide for direct civilian review over military justice matters, Congress established the Court of Military Appeals "so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd v. Bond, supra,* 395 U.S., at 695.

2. **The President's exercise of authority under 10 U.S.C. §§ 1161(b)(2) and 1167 in respondent's case will violate the *Ex Post Facto* and Double Jeopardy Clauses of the United States Constitution.**

This Honorable Court first discussed the *Ex Post Facto* Clause in *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). Justice Chase held that the clause proscribed four

types of legislation, the third of which is relevant to respondent's situation: "Every law that changes the punishment, ***and inflicts a greater punishment,*** than the law annexed to the crime, when committed" (*Calder,* at 390, emphasis added). These became such well-settled principles that in *Beazell v. Ohio,* 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216 (1925), Mr. Justice Stone stated:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to the law at the time when the act was committed, is prohibited as ex post facto.

This Honorable Court has consistently adhered to the *Calder* doctrine for 200 years. See generally *Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). In deciding whether a new law makes the punishment for a crime more burdensome, the approach of this Honorable Court has been to determine whether the new law is, in application, merely procedural, or substantively affects the punishment received for a given offense. Then Mr. Justice Rehnquist, delivering the opinion of the Court in *Dobbert v. Florida,* 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977), noted that:

> It is equally well settled, however, that "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime was committed." *Gibson v. Mississippi,* 162 U.S. 565, 590, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896).

> "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy v. South Carolina,* 237 U.S. 180, 183, 35 S.Ct. 507, 59 L.Ed. 905, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

This Honorable Court has consistently declined to establish any "formula" for determining which legislative acts will have a sufficient effect on substantive crimes or punishments to constitute an *ex post facto* violation. See *Beazell, supra,* 269 U.S., at 171, 46 S.Ct., at 69; *California Dept. of Corrections v. Morales,* 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). Thus, in determining if certain legislative acts violate the *Ex Post Facto* Clause of the Constitution, courts have looked to whether the legislation affects matters of substance or is merely procedural. In his concurrence in *Calder,* Justice Iredell described *ex post facto* laws as flagrant instances of tyranny, but limited them to penal legislation, a requirement that still exists today for an *ex post facto* violation. *Calder,* at 399. However, the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. *Burgess v. Salmon,* 97 U.S. 381, 24 L.Ed. 1104 (1878). Instead, one must look to the effect of the legislation. *Fletcher v. Peck,* 10 U.S. (6 Cranch.) 87, 3 L.Ed. 162 (1810). The constitutional prohibition is addressed to laws "whatever their form" that alter the nature of the offense or increase the punishment. *Beazell,* 269 U.S., at 170.

The DFR legislation was penal and punitive, both in intent and effect. First, by its own terms, 10 U.S.C. § 1161(b) applies to respondent solely "by reason of a sentence to confinement adjudged by a court-martial." Since the triggering mechanism is a conviction, this Section 1161(b) is

clearly penal. Second, the petition for certiorari describes a DFR action as a "personnel" action. The description is misstated. A review of the history of past and present DFR legislation reveals that the current DFR legislation has been enacted *in pari materia* with military justice matters as a punitive sanction for criminal behavior that was not imposed in the military criminal proceeding.

Prior to 1996, the DFR legislation only applied to officers who were absent without authority for at least three months or who were sentenced to confinement in a federal or state penitentiary or correctional institution after being found guilty of an offense by a court **other than** a court-martial or other military court. Congress specifically exempted court-martialed officers from being subject to DFR actions. In 1996, Congress amended the prior DFR statute, 10 U.S.C. § 1161(b), well after respondent's conviction and appeal, through Pub. L. 104-106, § 563, 110 Stat. 186. The amendment was effective February 10, 1996 and stated that a commissioned officer could be now be administratively separated under Section 1178 of Title 10 by reason of a sentence to confinement adjudged by a court-martial.[2] The legislation then amended Section 1161(b) to permit the Armed Forces to summarily drop such an officer from the rolls.

The same National Defense Authorization Act for FY 1996 enacted *in pari materia* Sections 1121 and 1122, which respectively amended Article 57(a) and created the new Article 58b, of the Uniform Code of Military Justice (UCMJ), thus evidencing an intent to use DFR actions in a punitive

[2] However, Title 10 had no section 1178. Congress corrected this error in the National Defense Authorization Act for FY 1997 in a technical amendment found at Pub. L. No. 104-201, § 1074(a)(5), 110 Stat. 2422. This amendment reworded § 1161 to read "section 1167" instead of "section 1178" effective Sept. 23, 1996.

manner in military justice matters. Amended Article 57(a) changed the effective date of adjudged forfeitures of pay and allowances and/or reductions in grade to the date the court-martial convening authority took action or 14 days after sentence was adjudged, whichever occurred first. The new Article 58b directed forfeitures of pay and allowances at the jurisdictional maximum of the special or general court-martial, depending on the forum at hand, when a service member's confinement was for more than six months, for less than six months if a punitive discharge was adjudged, or if death were adjudged. As the legislative history of Articles 57(a) and Article 58b reveals, the changes to these Articles were made specifically to punish military offenders who, at the time of the legislation, could continue to receive their military pay while serving their sentences to confinement, under certain circumstances. When Senator Boxer first brought this idea to Congress, she noted not only the money the legislation would save, but that it would "treat military criminals as they deserve to be treated—as criminals—to be punished, not rewarded." (141 Cong. Rec. S 802.) The Court of Appeals for the Armed Forces found this legislation to have a punitive intent and thus violative of the *Ex Post Facto* Clause in *United States v. Gorski*, 47 M.J. 370 (1997), when applied to military members whose crimes occurred before the effective date of the legislation.[3]

Thus, at the same time that Congress was changing Article 57(a) and adding Article 58b to accomplish their goal of punishing future offenders through military pay provisions, it also changed the law to allow the dropping of officers from

[3] The National Defense Authorization Act for FY 1996 applied amended Article 57(a) and new Article 58b to court-martial sentences adjudged "on or after the first day of the first month that begins at least 30 days after the date of the enactment of this Act." Thus, the effective date was April 1, 1996.

the rolls after their prior court-martial convictions. This ensured that officer prisoners in confinement at the time of the legislation would be subject to comparable punishments as those imposed by Article 57(a) and Article 58b on future offenders. This fact was noted by the Court of Appeals for the Armed Forces when it stated "[i]ndeed, termination of an officer's military status by dropping from the rolls—a termination resulting from punitive action taken pursuant to the UCMJ—would have the same effect of terminating pay that is imposed by Article 58b." Pet. for Cert. 14a. By enacting these three provisions *in pari materia,* Congress sought to impose punishments on officers in respondent's situation beyond the adjudged court-martial sentence. Mislabeling the DFR action as a personnel action is deliberately misleading. The DFR action is a direct criminal sanction to impose punishment that the court-martial chose affirmatively not to adjudge as a part of respondent's sentence: a discharge with ignominy[4], loss of all pay and allowances, and loss of VA benefits, including VA medical care for this HIV-infected service member[5].

It was precisely this Congressional climate, the interlocking legislative history, and effect of the DFR action that caused the Court of Appeals for the Armed Forces to conclude that the DFR legislation "can be viewed as part of a package designed to deal with the same congressional concern that motivated passage of the 'punitive' Article 58b."

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[4] It is important to note that a dismissal is considered the most severe punishment an officer accused can receive at a court-martial, short of a death sentence.

[5] By choosing to serve the DFR action after the respondent had elected to continue on active duty, the Air Force was able to eliminate respondent's opportunity to receive an involuntary separation under AFI 36-3207, with its corresponding separation pay, honorable discharge and other benefits.

Goldsmith v. Clinton, 48 M.J. 84, 90 (1998). Thus, the DFR legislation has a punitive intent and a punitive effect.

As support for its argument that the new DFR legislation is an administrative personnel action, the petitioner relies on *Helmich v. Nibert,* 543 F. Supp. 725 (D. Md. 1982) by citing the court's conclusion that a DFR action is a non-disciplinary administrative action. However, several key factors undercut the foundation of this conclusion. This action was brought by a *pro se* litigant who was serving out a 12-year sentence to confinement after his federal conviction for offenses stemming from planting a bomb at the Hartsfield Atlanta International Airport. At all relevant times to the proceedings, Helmich was a member of the Army Reserve. After notification of the federal sentence, the Reserve dropped Helmich from its rolls pursuant to the Army Rule 135-75, § 3-b, the enacting regulation for the pre-1996 DFR legislation. Helmich brought his action in federal district court alleging a violation of due process under the Fifth Amendment for having been dropped from the rolls without a discharge board hearing. The court then dismissed Helmich's complaint as failing to state a claim. *Helmich,* at 727. However, the court's opinion is fatally flawed as it did not consider the relevant VA regulation, which unequivocally states that "[a] discharge or release because of one of the offenses specified in this paragraph is considered to have been under *dishonorable* conditions: ... (3) An offense involving moral turpitude. This includes, generally, conviction of a felony." 38 C.F.R. § 3.12(d) (emphasis added). Despite its ultimate holding, the court properly acknowledged that a liberty interest, which is protected by the Fifth Amendment's Due Process Clause, is at hand when the military separates a member under conditions that stigmatize that member, "typically by *dishonorable* discharge." *Helmich,* at 727. (citation omitted). However, the *Helmich* court then erred in

its conclusion because the relevant VA regulation **did** impose a stigma akin to a dishonorable discharge upon a military member dropped from the rolls. Additionally, the member is denied payment of pension, compensation, or dependency and indemnity benefits. 38 U.S.C. § 101(2) and 38 C.F.R. § 3.12(a). The court's failure to consider, much less acknowledge, the VA regulation completely undermines its conclusion that Helmich's DFR action was merely administrative in nature. As such, this Honorable Court should reject petitioner's argument concerning the *Helmich* case.

Turning next to the Double Jeopardy issue, the Court of Appeals noted that this Honorable Court has interpreted this Clause to prohibit "the State from 'punishing twice, or attempting a second time to punish criminally, for the same offense.'" Pet. for Cert. 13a, citing *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2085, 138 L.Ed.2d 501 (1997), quoting *Witte v. United States*, 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351 (1995). A second punishment was imposed on respondent by Congress after he had already been tried and sentenced. The Court below reached the correct conclusion that this legislation was punitive; thus, it violated the Double Jeopardy Clause as applied to respondent.

3. **Deference to the military tribunal is particularly important in this context as the Court of Appeals for the Armed Forces was called upon to determine the constitutionality of the DFR action against respondent.** As remarked upon by this Honorable Court in *Noyd v. Bond*, 395 U.S., at 694, a substantial degree of deference must be accorded to military tribunals. Indeed, the Court of Appeals for the Armed Forces is uniquely qualified to consider the special requirements and concerns of the Armed Forces, a task it has been doing for over 47 years. The Court was specifically created to safeguard the rights of servicemembers.

In creating the UCMJ and the present appellate structure in 1950, Congress increased oversight of the military justice system. As Congressman Philbin from Massachusetts noted about the Court of Military Appeals (now named the Court of Appeals for the Armed Forces) during the Congressional Floor Debate on the UCMJ:

> [I]t is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the top-most rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military.

Cong. Floor Debate on UCMJ, U.S. House of Representatives, Cong. Record, Vol 95, Pt 5, p. 5718 (1949). Because of this unique charter, this Honorable Court should give great deference to the Court of Appeals' determination that it properly exercised jurisdiction as the issues before it concerned the constitutionality of a retroactive application of a statute increasing respondent's court-martial sentence. *See Middendorf v. Henry*, 425 U.S. 25, 43, 96 S.Ct. 1281, 1292, 47 L.Ed.2d 556 (1976)(dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference).

CONCLUSION

The opinion and judgment of the Court of Appeals for the Armed Forces must stand as the court below properly exercised its jurisdiction under the All Writs Act to prohibit the application of statutes violative of both the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution of the United States.

WHEREFORE, this Honorable Court should deny petitioner's petition for a writ of certiorari.

Respectfully submitted,

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No. 98-347

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

JAMES T. GOLDSMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent opposes certiorari in this case solely on the ground that, in his view, the Court of Appeals for the Armed Forces correctly asserted jurisdiction in this case and correctly invalidated an Act of Congress giving the President authority to drop convicted officers from the rolls. A constitutional holding that strips the President of authority given by Congress to enforce personnel standards in the military, however, raises a question that clearly merits this Court's attention. That is particularly so where the expansive theory of jurisdiction invoked by the lower court to reach that constitutional issue has significant ramifications for

military justice. Respondent's defense of the court of appeals' decision, moreover, is unsound.

1. On the threshold question whether the court of appeals had jurisdiction under the All Writs Act in this case, respondent argues (Br. in Opp. 3) that the court of appeals properly exercised power to "insure that only the adjudged and affirmed original sentence was carried out." He contends (*id.* at 7) that an action to drop him from the rolls falls within the court's authority because that action "affected and increased the punishment imposed by the decision of the court-martial."

That theory fails to explain how the court of appeals' intervention was "necessary or appropriate in aid of" (28 U.S.C. 1651(a)) its limited jurisdiction, *i.e.*, to review the findings and sentences of a court-martial conviction. See 10 U.S.C. 867. The Air Force's administrative action to drop respondent from its rolls was not part of the sentence imposed by respondent's court-martial. Indeed, the action to drop him from the rolls was commenced only after respondent's conviction had become final and no longer subject to review.[1] A significant sign of how far beyond its limited sphere of reviewing courts-martial convictions the court traveled is that its writ in this case purports to bar action by individuals, such as the President, who were not even parties to the court-martial.

---

[1] Respondent therefore mistakenly relies (Br. in Opp. 5) on decisions recognizing that writs may be issued in aid of a court's pending or potential appellate jurisdiction. See, *e.g.*, *Adams* v. *United States*, 317 U.S. 269, 273 (1942); *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1004-1005 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964). No such pending or potential case on appeal existed, apart from the application for the extraordinary writ itself.

Respondent also relies (Br. in Opp. 4-7) on previous decisions of the court of appeals for the proposition that it may invoke the All Writs Act "to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces." *Id.* at 5; see also Pet. App. 5a n.3 and Pet. 10-11 (listing cases). That pattern of decisions, however, cannot confer jurisdiction where none exists. Nor, contrary to respondent's assertion (Br. in Opp. 5), did this Court in *United States* v. *Augenblick*, 393 U.S. 348 (1969), "endorse[]" *United States* v. *Bevilacqua*, 39 C.M.R. 10, 11 (1968), in which the Court of Military Appeals considered an application for a writ of coram nobis to challenge a court-martial conviction that was not subject to appellate review under 10 U.S.C. 867. In *Augenblick*, the Court reserved the question whether the Court of Claims could collaterally review a court-martial conviction and held that the Court of Claims erred in its ruling on the merits. 393 U.S. at 351-352. The Court also observed that the Court of Military Appeals "apparently" could have reviewed the defendant's challenge to his conviction under *Bevilacqua*. *Id.* at 350. The Court did not, however, indicate its approval of *Bevilacqua*, which at that time was not, in any event, subject to this Court's review. Military Justice Act of 1983, Pub. L. No. 98-209, § 10(a)(1), 97 Stat. 1405 (codified at 28 U.S.C. 1259 (Supp. II 1984)). Finally, *Bevilacqua* did not even mention the All Writs Act, and this Court has noted in subsequent cases the "conceptual difficulty" with the court of appeals' exercise of jurisdiction outside "appeals from court-martial convictions" under 10 U.S.C. 867. *Parisi* v. *Davidson*, 405 U.S. 34, 44 (1972); see also *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969).

2. On the merits, respondent argues (Br. in Opp. 10-13) that Congress intended an action to drop an officer from the rolls to be a penal proceeding, because the same statute that amended Section 1161(b) and added Section 1167 "enacted *in pari materia*" provisions that amended Article 57(a) and added Article 58b to the Uniform Code of Military Justice. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tits. V, XI, §§ 563(a)(1)(A) and (b)(1), 1121, 1122, 110 Stat. 325, 462-463.[2] Relying on the court of appeals' decision in *United States* v. *Gorski*, 47 M.J. 370 (1997), which held that Articles 57(a) and 58b are punitive measures, respondent contends (Br. in Opp. 12) that Sections 1161(b) and 1167 similarly impose "criminal punishments beyond the adjudged court-martial sentence."

Respondent is mistaken. Congress enacted all four provisions pursuant to the National Defense Authorization Act for Fiscal Year 1996. That Act spans 517 pages in the *Statutes at Large* and addresses in 57 separate Titles a variety of unrelated issues affecting the Department of Defense, such as procurement, health care, departmental organization and management, and national security policy. In Title V of the Act, which is entitled "Military Personnel Policy," Congress amended Section 1161(b) and enacted Section 1167. Pub. L. No. 104-106, §§ 501-574, 110 Stat. 290-356. By contrast, Articles 57(a) and 58b were enacted as part of Title XI, which contains amendments to the Uniform Code of

[2] Article 58b mandates the forfeiture of military pay following a prescribed court-martial sentence of a servicemember, and Article 57(a) alters the effective date of any forfeiture of pay or reduction in grade that is included in a court-martial sentence of a servicemember. See 10 U.S.C. 857(a), 858b (1994 & Supp. II 1996).

Military Justice. Pub. L. No. 104-106, §§ 1101-1153, 110 Stat. 461-468. Accordingly, Congress's intent in amending the Uniform Code of Military Justice has no bearing on Congress's intent in amending the military's personnel policies. To the contrary, by placing the amendment to Section 1161(b) and the newly enacted Section 1167 in Chapter 59 of Title 10 of the U.S. Code, which is entitled "Separation" and concerns military personnel matters, Congress indicated its intent simply to broaden an existing civil procedure for dropping officers from the rolls when they have committed a serious crime. See Pet. 2-3, 15-16.

Respondent also argues (Br. in Opp. 9-10) that an action to drop him from the rolls is "clearly penal" because it is premised on his court-martial conviction. But Congress may impose both a criminal and civil sanction with respect to the same underlying conduct. *Helvering* v. *Mitchell*, 303 U.S. 391, 397-398 (1938). An officer's criminal conviction may result in a variety of adverse collateral consequences that serve civil remedial goals, such as separation from service, revocation of a security clearance, or non-selection for promotion. The fact that those personnel actions follow a criminal conviction does not transform those remedial actions into criminal penalties. See *Koon* v. *United States*, 518 U.S. 81, 110 (1996) ("[M]any public employees are subject to termination and are prevented from obtaining future government employment following conviction of a serious crime, whether or not the crime relates to their employment."); 10 U.S.C. 504 (generally barring felons from enlisting in the military); cf. *DeVeau* v. *Braisted*, 363 U.S. 144, 159-160 (1960) (plurality opinion) (noting federal and state governments' "wide utilization of disqualification of convicted felons for certain employments closely touching the public interest" and

rejecting *ex post facto* challenge to New York's bar of ex-felons from union office).

Respondent contends (Br. in Opp. 12-14) that an action to drop an officer from the rolls punishes the officer by depriving him of military pay and veterans' benefits.[3] Under this Court's decision in *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997), the relevant question is not whether a sanction "could * * * be described as punishment," but rather whether it is *criminal*, either by legislative intent or by a punitive purpose or effect that clearly negates the legislature's intent to impose a civil remedy. The loss of pay and benefits resulting from an action to drop from the rolls is indistinguishable in purpose and effect from the loss of pay or benefits that may result from any involuntary termination of employment from the military, including termination because of a defective enlistment, medical necessity, non-performance of military duty, or misconduct that is not a criminal offense. See 32 C.F.R. Pt. 41, App. A; 38 C.F.R. 3.12. In none of those instances is the loss of pay or benefits akin to criminal punishment. *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960) (rejecting *ex post facto*, bill of attainder, and Sixth Amendment challenges to provision terminating Social Security benefits of deported aliens because "the sanction is the mere denial of a noncontractual governmental benefit" that imposes "[n]o affirmative disability or restraint," and "certainly nothing approaching the 'infamous punishment' of imprisonment"). Even where a criminal

[3] Under 38 C.F.R. 3.12(k)(3), an officer who is dropped from the military's rolls may be denied veterans' benefits if the "facts and circumstances surrounding separation" do not support the conclusion that the separation "was under conditions other than dishonorable."

conviction forms the basis of an adverse personnel action, the resulting loss of pay and benefits furthers legitimate remedial goals and does not constitute a criminal penalty. See *Peeler* v. *Heckler*, 781 F.2d 649, 652 (8th Cir. 1986) (provision denying Social Security benefits to convicted felons does not impose *ex post facto* criminal punishment "since there is a rational connection between the provision and the non-punitive goal of regulating the distribution of disability benefits"); accord *Jensen* v. *Heckler*, 766 F.2d 383, 386 (8th Cir.), cert. denied, 474 U.S. 945 (1985).

3. Finally, respondent contends that the court of appeals' decision is entitled to deference because it addresses matters "peculiar to the military branches." Br. in Opp. 15 (citing *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976)). This Court, however, exercises plenary review over constitutional issues that arise within the military justice system. See, *e.g.*, *United States* v. *Scheffer*, 118 S. Ct. 1261, 1269 (1998) (reversing court of appeals' holding that exclusion of polygraph evidence in court-martial proceedings under Military Rule of Evidence 707 violated the Constitution); *Middendorf*, 425 U.S. at 43-48 (not deferring to court of appeals' holding that Sixth Amendment requires counsel in summary courts-martial). The Court also has plenary authority to declare the proper interpretation of the All Writs Act; that is not an issue peculiar to the military. Because the court of appeals' jurisdictional and constitutional holdings transcend the military context, they warrant independent review by this Court.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JUDITH A. MILLER
General Counsel
Department of Defense

OCTOBER 1998

Supreme Court, U.S.
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No. 98-347

In the Supreme Court of the United States

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v.

JAMES T. GOLDSMITH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: AUGUST 26, 1998
CERTIORARI GRANTED: NOVEMBER 2, 1998

1 PP

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DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

[Department of Defense seal omitted]

10 SEP 1996

Brigadier General Robert J. Courter, Jr.
Commander, 37th Training Wing
2000 Bong Avenue Suite 1
Lackland AFB TX 78236-5000

Major James T. Goldsmith
C/O Major Sperre
HQ AFSPA Det 1
US Disciplinary Barracks
Ft Levenworth KS 66027

Dear Major Goldsmith

This is to inform you that you were considered but not selected for promotion to the grade of lieutenant colonel by the CY96C Lieutenant Colonel Promotion Board which convened at the Air Force Personnel Center on 08 Jul 96. You were, however, selected for continuation by the CY96C Major Selective Continuation Board that convened in conjunction with the promotion board.

As a result of your selection by the continuation board, you have the opportunity to remain on active duty until you first become eligible to retire as an officer at 20 years of military service. Your decision to

accept or decline continued active service must be indicated on the attached continuation acceptance/ declination statement and returned to 37 MSS/ DPMPE-3 by **8 Nov 96**. However, if you accept continuation, your date of separation will not be established, until the current Uniform Code of Military Justice (UCMJ) action is finalized. If you decline, your date of separation will be established as 28 Feb 97, but you will be placed on administrative hold until the UCMJ action has been completed.

Provided you remain eligible, you will be considered for promotion by the next Lieutenant Colonel Promotion Board which will consist of entirely different board members. You will be considered for promotion by all subsequent central Lieutenant Colonel Promotion Boards for which you meet the eligibility criteria. If you have questions concerning your promotion status or selective continuation please contact TSgt Hyde, MPF Promotions at DSN 473-3806. Please acknowledge receipt of this letter and return it within five days to 37 MSS/DPMPE-3.

Sincerely

/s/ ROBERT J. COURTER, JR.
ROBERT J. COURTER, JR.
Brigadier General, USAF
Commander

Attachments:

1. *Acceptance*/Declination Statement
2. Separation Fact Sheet

1st Ind, to 37 TRW/CC memo, Lt Col Nonselection

TO: 37 MSS/DPMPE-3
1561 Stewart Street Suite 4
Lackland AFB TX 78236
Attn: Tsgt. Hyde

Receipt acknowledged.

signed 24 Sep. 96

JAMES T. GOLDSMITH, Maj, USAF
449-23-0792

STATEMENT OF ACCEPTANCE/DECLINATION
FOR SELECTIVE CONTINUATION

1. /s/ JTG I accept continuation on active duty. I understand that I may withdraw an earlier established voluntary DOS and accept continuation. Accordingly, as a continued officer, I understand:

a. I cannot change my decision after 60 calendar days following the release of the results of the Selective Continuation Board IAW AFI 36-2501.

b. Continuation begins on 1 Mar 97 and my date of separation will be established to coincide with the date I first become eligible for retirement (20 year retirement) as an officer under any provision of law or age 60 as a Reserve officer, whichever date is earlier.

c. I incur a one year active duty service commitment from the date my continuation period begins. I may apply for a date of separation or retirement, if eligible, that is no earlier than the completion of my commitment. Also, a request for separation any time after entering the continuation period is voluntary and, if approved, will not result in separation payment.

d. Unless rendered ineligible under some other provision of law, regulation, or policy, I will remain eligible for schooling, assignments, and promotion consideration.

e. If selected and promoted to the active duty grade of lieutenant colonel, I will no longer be considered as serving in a continued status.

f. I remain subject to separation under other policies, regulations or statutes during my continued service.

2. ___ I decline continuation on active duty. I understand that if I decline continuation or do not respond within 60 calendar days, I will be involuntarily separated under AFI 36-3207 or I may elect early retirement after declining continuation if otherwise eligible and TERA is still available NLT 28 Feb 97.

/s/ JAMES T. GOLDSMITH
JAMES T. GOLDSMITH, Maj, USAF
459-23-0792

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QUESTIONS PRESENTED

In the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate military status and pay for, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. 1161(b)(2), 1167 (Supp. II 1996). The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. 1161(b)(2) and 1167 (Supp. II 1996).

2. Whether the President's exercise of authority under 10 U.S.C. 1161(b)(2) and 1167 (Supp. II 1996) in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

PARTIES TO THE PROCEEDING

Petitioners are William J. Clinton, President of the United States; William S. Cohen, Secretary of Defense; F. Whitten Peters, Acting Secretary of the Air Force; Lieutenant General David W. McIlvoy, Vice Commander, HQ Air Education and Training Command, Randolph Air Force Base, Texas. Petitioners were named as respondents/appellees in the court of appeals. All petitioners appear in their official capacities only. The claims against the following individuals were dismissed by the court of appeals as moot: Robert M. Walker, Acting Secretary of the Army; Colonel Marvin Nickels, Commandant, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas; and Colonel Gatrell, Commander, Munson Army Hospital, Fort Leavenworth, Kansas.

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19 J.W. Moore, *Moore's Federal Practice* (3d ed. 1998)	16, 19
36 Op. Atty. Gen. (1930)	28
S. Rep. No. 486, 81st Cong., 1st Sess. (1949)	21
W. Winthrop, *Military Law and Precedents* (2d ed. 1920)	28
16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (2d ed. 1996)	16

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-347

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

JAMES T. GOLDSMITH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 48 M.J. 84. The order of the Air Force Court of Criminal Appeals (Pet. App. 22a-24a) is unreported. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction (Pet. App. 30a-38a) is also unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998. On July 21, 1998, Chief Justice Rehnquist extended the time within which to file a petition for a writ of

certiorari to and including August 27, 1998. The petition was filed August 26, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1259(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reproduced at App., *infra*, 1a-8a.

STATEMENT

Following trial by a general court-martial, respondent was convicted of willfully disobeying a "safe sex" order from a superior officer, assault with means likely to produce death or grievous bodily harm, and assault consummated by a battery, in violation of Articles 90 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 890, 928. He was sentenced to six years' confinement and forfeiture of $2500 pay per month for 72 months. The Air Force Court of Criminal Appeals affirmed the conviction, and respondent sought no further review of that decision. The Air Force then initiated action to drop respondent from the rolls of the Air Force because of his court-martial conviction and sentence. On respondent's application, the Court of Appeals for the Armed Forces issued an extraordinary writ under the All Writs Act, 28 U.S.C. 1651(a), barring the President and military officials from dropping respondent from the rolls of the Air Force.

A. The Statutory Background

1. The President, as Commander in Chief of the armed forces, commissions all officers of the military. U.S. Const. Art. II, § 3. Since 1870, the President also has had the authority to drop from the rolls of the Army any officer who has been absent from duty for three months without leave. Act of July 15, 1870, ch. 294, § 17, 16 Stat. 319. In 1911, Congress extended the President's authority to drop from the Army's rolls officers who have been absent in confinement in a prison or penitentiary after final conviction by a civilian court. Act of Jan. 19, 1911, ch. 22, 36 Stat. 894; see also Act of Apr. 2, 1918, ch. 39, 40 Stat. 501 (authorizing President to drop from the rolls of the Navy and Marine Corps officers who have been absent from duty without leave for three months or more or found guilty by civilian authorities of any offense); Act of May 5, 1950, ch. 169, § 10, 64 Stat. 146 (authorizing President to drop from the rolls "of any armed force" officers who have been absent without authority for at least three months or finally sentenced to confinement in a Federal or State penitentiary or correctional institution).

On February 10, 1996, as part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, codified at 10 U.S.C. 1161(b)(2) and 1167 (Supp. II 1996), Congress expanded the President's authority to drop officers from the rolls. Section 1161(b)(2) authorizes the President to "drop from the rolls of any armed force any commissioned officer * * * who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court martial." 10 U.S.C. 1161(b)(2) (Supp. II 1996). Section 1167 in turn provides that "a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final * * * and the member has served in confinement for a period of six months." 10 U.S.C. 1167 (Supp. II 1996).

2. A military officer also may be involuntarily separated under a variety of other circumstances and pro-

ceedings. For instance, the President may order the dismissal of an officer "in time of war." 10 U.S.C. 1161(a)(3). An officer also may be administratively separated because of the officer's "substandard performance," "misconduct" or "moral or professional dereliction" or because the officer's "retention is not clearly consistent with the interests of national security." 10 U.S.C. 1181(a) and (b); see also 10 U.S.C. 1182-1186 (setting forth procedures for separation and rights of review before boards of inquiry and boards of review). An officer's separation under Section 1181 is characterized by the particular armed force as Honorable, General (Under Honorable Conditions), or Under Other Than Honorable Conditions. See DoD Instruction 1332.40, Encl. 7 (Sept. 16, 1997); Air Force Instruction 36-3206, §§ 2.1, 3.1 (Oct. 14, 1994).

Similarly, enlisted servicemembers may be administratively discharged "as prescribed by the Secretary concerned." 10 U.S.C. 1169. Pursuant to Section 1169, the Secretary of Defense has promulgated regulations that set forth the "policies, standards, and procedures governing the administrative separation of enlisted members." 32 C.F.R. 41.1; see also Air Force Instruction 36-3208 (Oct. 14, 1994). Under those regulations, enlisted servicemembers may be separated for, among other things, "[c]ommission of a serious military or civilian offense" in certain circumstances or when the member requests administrative separation "in lieu of trial by court-martial." 32 C.F.R. Pt. 41, App. A, pt. 1, K.1.a(3) and L.[1]

[1] As is the case with the separation of officers under Section 1181, an enlisted member's discharge under Section 1169 may result in a characterization of service as Honorable, General (Under Honorable Conditions), or Under Other Than Honorable Conditions. 32 C.F.R. Pt. 41, App. A, pt. 1; Air Force Instruction 36-3208, §§ 1.16.1, 1.18 (Oct. 14, 1994).

An officer or enlisted member may challenge an administrative separation from the military. Each armed force has a Board for Correction of Military Records that may review a member's "discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial)" or "correct any military record * * * when * * * necessary to correct an error or remove an injustice." 10 U.S.C. 1552(a)(1), 1553(a). Such Boards may award back pay, 10 U.S.C. 1552(c), and, "subject to review by the Secretary concerned, change a discharge or dismissal," 10 U.S.C. 1553(b). "Board decisions are subject to judicial review [by federal courts] and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983).

3. Officers and enlisted members may also be separated from the military as part of a criminal sentence imposed by court-martial under the UCMJ, 10 U.S.C. 801 *et seq.* Under the President's authority to prescribe the maximum "punishment which a court-martial may direct for an offense," 10 U.S.C. 856, the President has prescribed "three types of punitive separation" that may be adjudged by a court-martial: a "dismissal" of a commissioned officer who is convicted of any offense by a general court-martial; a "dishonorable discharge" of an enlisted member who is convicted of certain offenses by general court-martial; and a "bad conduct discharge" of an enlisted member who is convicted of certain offenses by general or special court-martial. Rules for Courts-Martial (R.C.M.) 1003(b)(9)(A)-(C). "A court-

martial may not adjudge an administrative separation from the service." *Id.* at 1003(b)(9).

A court-martial sentence that includes a punitive dismissal or discharge is subject to review as of right by a military department's Court of Criminal Appeals. 10 U.S.C. 866(b)(1). That appellate decision is subject to discretionary review by the Court of Appeals for the Armed Forces (CAAF). 10 U.S.C. 867(a). Congress established the CAAF pursuant to its power to govern and regulate the armed forces under Article I, Section 8, Clause 14, of the Constitution. 10 U.S.C. 941. The CAAF has power to act "only with respect to matters of law" and "only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. 867(c); see generally *Weiss* v. *United States*, 510 U.S. 163, 167 (1994); *Parisi* v. *Davidson*, 405 U.S. 34, 41 n.7 (1972).

B. The Current Controversy

1. Respondent is a commissioned officer in the United States Air Force serving in the rank of Major. After he was diagnosed as HIV-positive, his superior commissioned officer ordered him to inform sexual partners of his HIV status and to employ methods, including condoms, to prevent the transfer of bodily fluids during sexual relations. Pet. App. 31a. Respondent nevertheless had unprotected vaginal intercourse with a fellow officer and a civilian without informing them that he was HIV-positive. Respondent was thereafter tried by general court-martial on two specifications of willfully disobeying a "safe sex" order from a superior officer, two specifications of assault with a means likely to produce death or grievous bodily harm,

and one specification of assault on a superior commissioned officer, in violation of 10 U.S.C. 890 and 928. Respondent was convicted as charged, except that he was acquitted of assault on a superior officer and instead convicted of the lesser-included offense of assault consummated by battery. On March 4, 1994, respondent was sentenced to six years' confinement and forfeiture of $2500 pay per month for 72 months. On November 20, 1995, the Air Force Court of Criminal Appeals affirmed the conviction. Respondent did not seek further review of that decision in the United States Court of Appeals for the Armed Forces under 10 U.S.C. 867(b), and his conviction therefore became final. 10 U.S.C. 871(c)(1)(A); see also R.C.M. 1209(a). Respondent was incarcerated at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. Pet. App. 2a.

2. On or before December 18, 1996, the Air Force notified respondent that it had initiated action under Section 1161(b)(2) to drop him from the rolls of the Air Force on the basis of his final court-martial conviction and confinement. Pet. App. 25a-29a. On December 20, 1996, while serving in confinement, respondent petitioned the Air Force Court of Criminal Appeals for extraordinary relief under the All Writs Act, 28 U.S.C. 1651(a), alleging that his receipt of HIV medication had been interrupted. On January 9, 1997, the Air Force Court of Criminal Appeals denied the petition for lack of jurisdiction. Pet. App. 22a-24a.

On January 23, 1997, respondent filed a combined Petition for Extraordinary Relief and Writ Appeal in the United States Court of Appeals for the Armed Forces, reiterating his claims with regard to his medication, and arguing for the first time that the Air Force's action to drop respondent from its rolls violated

the Double Jeopardy and *Ex Post Facto* Clauses. Respondent argued that because his court-martial conviction triggered the Air Force's action to drop him from the rolls, Sections 1161(b)(2) and 1167, which were enacted after his conviction, imposed an *ex post facto* punishment. He similarly contended that the provisions violated the Double Jeopardy Clause because they authorized the infliction of successive punishment based on the same conduct underlying his conviction. Pet. App. 13a; Resp. C.A. Br. A1-6 to A1-9.

3. On August 25, 1997, the court of appeals issued an order staying any proceeding to drop respondent from the rolls. Pet. App. 20a-21a. In October 1997, respondent's sentence expired and he returned to duty status. In April 1998, the court of appeals denied respondent's writ-appeal petition respecting his medical treatment claim as moot but, by a three-to-two vote, granted his petition for extraordinary relief barring the President and military officials from taking action to drop respondent from the rolls. Pet. App. 1a-19a.[2]

The court of appeals rejected the Air Force's contention that the court lacked jurisdiction under All Writs Act to entertain respondent's requests for extraordinary relief. The Air Force had argued that the challenged matters constitute "administrative actions which are separate and apart from the processing of any matter against [respondent] under the Uniform Code of Military Justice." Gov't C.A. Br. 9. The court

[2] After the court of appeals stayed the Air Force's action to drop respondent from the rolls, but before the court of appeals issued its decision, the Air Force instituted an administrative separation proceeding against respondent under Section 1181 and Air Force Instruction 36-3206 and 36-3207. The Air Force has deferred that proceeding pending the resolution of this case.

of appeals, however, noted that its earlier decisions had rested on the premise that "Congress intended for the [court of appeals] to have broad responsibility with respect to administration of military justice." Pet. App. 5a. It therefore had found jurisdiction to review via the All Writs Act "a case that [the court] cannot possibly review directly." *Id.* at 5a-6a. In light of those decisions, the court concluded that it is thus "empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court." *Id.* at 6a.

The court then held that respondent at least initially was entitled to bring a writ-appeal petition raising his medical treatment claim, even though his "release from confinement has now mooted his claim." Pet. App. 8a. The court further found that respondent's failure to raise in the Court of Criminal Appeals his challenge to the Air Force's personnel action was not fatal to the court of appeal's jurisdiction. The court explained that, "consistent with the concept of 'pendent jurisdiction,'" respondent's "proper filing in this Court of a writ-appeal petition as to suspension of necessary medications allowed him to 'piggyback' thereon * * * the issue of lawfulness of dropping him from the rolls of the Air Force." *Id.* at 9a.

Turning to the merits of respondent's challenge to Sections 1161 and 1167, the court of appeals acknowledged that the President's statutory authority to drop an officer from the rolls is "not labeled 'punishment,'" but instead is part of Title 10 that concerns "[p]ersonnel" matters. Pet. App. 14a. Nevertheless, the court held that, "[a]lthough the issue is a close one, * * * in order fully to accomplish the purposes of the

Ex Post Facto and Double Jeopardy Clauses," the Air Force's action to drop respondent from the rolls based on a court-martial conviction should be treated as "punitive." *Ibid.* The court explained that Congress enacted Sections 1161 and 1167 as part of the same public law, Pub. L. No. 104-106, that added to the UCMJ Article 58b, 10 U.S.C. 858b (Supp. II 1996), a provision that mandates the forfeiture of military pay following a prescribed sentence imposed by court-martial. Pet. App. 14a. The court also observed that in *United States* v. *Gorski*, 47 M.J. 370 (C.A.A.F. 1997), it had held that Article 58b is a punitive sanction under the UCMJ that is subject to the *Ex Post Facto* Clause. Pet. App. 13a. The court further reasoned that an action to drop an officer from the rolls involves a "stigma very akin to that involved in 'punishment.'" *Id.* at 14a. The court of appeals therefore held that "under all the circumstances surrounding enactment of Pub. L. No. 104-106, the provision for 'dropping from the rolls' was 'punitive' for purposes of the Double Jeopardy Clause and, *a fortiori*, for purposes of the *Ex Post Facto* Clause." *Id.* at 15a n.10. In a footnote, the court stated that those same statutory "circumstances" also sufficed to distinguish *Hudson* v. *United States*, 118 S. Ct. 488 (1997), in which this Court had found that an occupational debarment sanction imposed on individuals administratively for their banking violations did not constitute "punishment" under the Double Jeopardy Clause. Pet. App. 14a-15a n.10.[3]

[3] Judges Cox and Sullivan filed separate concurrences. Pet. App. 15a-17a. Judge Cox wrote to respond to the dissent's criticism that the court lacked jurisdiction under the All Writs Act to review an "administrative action" to drop an officer from the rolls. Pet. App. 15a. In his view, the court's "jurisdiction extends only to the Constitutional *ex post facto* question." *Id.* at 16a. Judge Sullivan emphasized the court's "responsibility of protecting the rights of all servicemembers in court-martial matters," especially "when a 'second punishment,' directly tied to [a] court-martial, is imposed * * * by an *ex post facto* law." *Id.* at 17a.

Judge Gierke, joined by Judge Crawford, dissented. Pet. App. 17a-19a. They observed that "[d]ropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial," and unlike the provision at issue in *United States* v. *Gorski*, *supra*, "[Section] 1167 is not part of the Uniform Code of Military Justice but, instead, is part of the United States Code pertaining to personnel matters." Pet. App. 17a-18a. In their view, dropping an officer from the rolls is purely an "administrative personnel decision, in the same category as a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance." *Id.* at 19a. Thus, Judges Gierke and Crawford would have held that the court lacked jurisdiction to review the Air Force's action to drop respondent from the rolls. *Ibid.*

SUMMARY OF ARGUMENT

1. The court of appeals lacks jurisdiction under the All Writs Act, 28 U.S.C. 1651, to enjoin the President and military officials from instituting a personnel action to drop respondent from the rolls of the Air Force. The All Writs Act authorizes courts to issue writs "necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. 1651(a). The writ in this case furthers no such jurisdiction.

Congress has confined the jurisdiction of the Court of Appeals for the Armed Forces to the review of specified sentences imposed by court-martial. 10 U.S.C.

866(b), 867(a). The action to drop respondent from the rolls of the Air Force was not, and could not have been, a feature of a court-martial sentence. The Air Force instituted the personnel action against respondent under the administrative provisions of 10 U.S.C. 1161(b)(2) and 1167 after his court-martial sentence already had become final. Because an action to drop from the rolls is not within the court of appeals' existing or potential appellate jurisdiction, the court of appeals writ was not "in aid of" the court's jurisdiction under the All Writs Act.

The court of appeals' writ also was not "necessary or appropriate" within the meaning of the All Writs Act. Respondent could have brought his personnel challenge before the Air Force's Board for Correction of Military Records, and then sought judicial review of an adverse Board decision in a federal court. *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). Because such means of review are available to respondent, the court of appeals erred in invoking the All Writs Act as an alternative avenue of relief.

The court of appeals' assertion of jurisdiction over respondent's personnel challenge also cannot be supported by the theory that this challenge was "pendent" to respondent's claim that he was denied medical treatment while in confinement. The court of appeals had no jurisdiction over respondent's medical treatment claim. In any event, respondent's medical treatment claim and his personnel claim are not sufficiently related such that the claims could be considered "pendent."

2. The court of appeals further erred in holding that the Air Force's personnel action triggers the application of the Double Jeopardy and *Ex Post Facto* Clauses. Those Clauses apply only to laws or proceedings that impose *criminal* punishment. Whether a particular

sanction is civil or criminal depends on legislative intent, unless "the clearest proof" establishes that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997) (internal quotation marks, brackets, and citations omitted).

Congress intended an action to drop an officer from the rolls to be a *civil*, administrative proceeding. An action to drop from the rolls is not part of a criminal sentence imposed by a court-martial under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* Rather, an action to drop from the rolls is an administrative personnel action by which the President may separate an officer who is no longer suitable for military service because he has been absent without leave or has been convicted of a crime.

There is no proof, let alone the clear proof needed, to overcome Congress's intention to create a civil sanction. An action to drop an officer from the rolls of the armed forces is not punitive either in its purpose or effect. It is a remedial measure designed to remove an officer who is no longer performing military service or whose continued service is inconsistent with the military's mission, standards of conduct, and good order and discipline. Those remedial purposes are especially apparent in light of the officer's status as a leader in the military chain of command.

The civil, remedial character of an action to drop from the rolls is not altered by the fact that the action is based on a court-martial conviction. Congress may impose a civil and criminal sanction for the same underlying conduct, *Hudson*, 118 S. Ct. at 496; *Helvering* v. *Mitchell*, 303 U.S. 391, 397-398 (1938), and a criminal conviction often results in adverse collateral employ-

ment consequences that do not constitute criminal punishment. Similarly, the loss of military privileges resulting from separation from the military is not a criminal punishment, because such a sanction "is characteristically free of the punitive criminal element." *Hudson*, 118 S. Ct. at 496 (quoting *Helvering* v. *Mitchell*, 303 U.S. at 399 & n.2).

ARGUMENT

I. THE COURT OF APPEALS FOR THE ARMED FORCES LACKED JURISDICTION UNDER THE ALL WRITS ACT TO BAR THE MILITARY FROM DROPPING RESPONDENT FROM THE ROLLS OF THE AIR FORCE

Respondent challenges the constitutionality of the Air Force's action to drop him from the rolls. The court of appeals, however, lacked jurisdiction under the All Writs Act, 28 U.S.C. 1651, to hear that challenge. Respondent's claim did not come within the court of appeals' limited jurisdiction to review court-martial convictions under 10 U.S.C. 867. The court of appeal's writ in this case was therefore not "necessary or appropriate in aid of [the court's] jurisdiction[ ]" (28 U.S.C. 1651(a)).

1. The Court of Appeals for the Armed Forces is an Article I court with limited jurisdiction. Its jurisdiction is restricted by statute to court-martial cases reviewed by a Court of Criminal Appeals involving specific types of sentences: a sentence of death; a sentence including dismissal of a commissioned officer; a sentence including the dishonorable or bad conduct discharge of an enlisted servicemember; or a sentence to confinement for one year or more. 10 U.S.C. 866(b), 867(a); *Weiss* v. *United States*, 510 U.S. 163, 168 (1994); *Parisi* v. *Davidson*, 405 U.S. 34, 41 n.7, 44 (1972). The Court of

Appeals for the Armed Forces thus "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. 867(c).

There is no dispute that the court of appeals lacked jurisdiction under 10 U.S.C. 867 to hear respondent's challenge to the Air Force's personnel action to drop him from the rolls, which the Air Force initiated almost one year after respondent's conviction became final. Pet. App. 25a-29a; see also 10 U.S.C. 1167 (Supp. II 1996) (authorizing separation only "after the sentence to confinement has become final under [the UCMJ]"). The court of appeal's jurisdiction under Section 867 is limited to court-martial cases on direct review, *Hendrix* v. *Warden*, 49 C.M.R. 146, 147 (C.M.A. 1974), and an administrative action to drop from the rolls is not part of a sentence adjudged by a court-martial. See R.C.M. 1003(b)(9) ("A court-martial may not adjudge an administrative separation from the service.").

Because the court of appeals has no source of jurisdiction directly to review an action to drop from the rolls, it has no jurisdiction over respondent's challenge pursuant to the All Writs Act, 28 U.S.C. 1651(a). The All Writs Act authorizes courts to issue writs "necessary or appropriate in aid of their respective jurisdictions." The quoted language means that courts may issue writs only in cases otherwise within their original or appellate jurisdiction; the Act does not expand the bases for jurisdiction. *Pennsylvania Bureau of Correction* v. *United States Marshals Serv.*, 474 U.S. 34, 41 (1985) (Act does not authorize review "where jurisdiction [does] not lie under an express statutory provision"); *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603 (1966) (Act "extends to the potential jurisdiction of the

appellate court where an appeal is not then pending but may be later perfected"); *In re Massachusetts*, 197 U.S. 482, 488 (1905) (Court lacks jurisdiction to issue writs "in cases over which [it] possesses neither original nor appellate jurisdiction"); *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 601 (1821) (the Act "vest[s] the power * * * in cases where the jurisdiction already exists"); see also 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3932, at 470 (2d ed. 1996) ("The All Writs Act * * * is not an independent grant of appellate jurisdiction."); 19 *Moore's Federal Practice* § 204.02[4] (3d ed. 1998) ("[t]he All Writs Act cannot enlarge a court's jurisdiction").[4]

[4] Before Congress authorized this Court in 1983 to review decisions of the Court of Appeals for the Armed Forces (formerly the Court of Military Appeals), see Military Justice Act of 1983, Pub. L. No. 98-209, § 10(a)(1), 97 Stat. 1405, this Court recognized "the power of the Court of Military Appeals to issue an emergency writ * * * in cases * * * which may ultimately be reviewed by that court." *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969). The Court recognized, however, that "[a] different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes." *Ibid.* Similarly, in *Parisi* v. *Davidson*, 405 U.S. 34, 44 (1972), this Court explained that "the All Writs Act only empowers courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions . . .,' and the jurisdiction of the Court of Military Appeals is limited by the Uniform Code of Military Justice to considering appeals from court-martial convictions." The Court in *Parisi* therefore questioned whether the Court of Military Appeals could consider a servicemember's claim for discharge from the military as a conscientious objector, over which "[t]hat court has been given no 'jurisdiction.'" *Ibid.* The Court further observed that "[w]hether this conceptual difficulty might somehow be surmounted is a question for the Court of Military Appeals itself ultimately to decide." *Ibid.* Now that this Court has jurisdiction to review decisions of the court of appeals, the question is one for ultimate resolution in this Court.

Those decisions establish that the court of appeals may issue a writ under 28 U.S.C. 1651 only when the writ is issued "in aid of" a court's existing or potential appellate jurisdiction. No such pending or potential case on appeal existed in this case, apart from the application for the extraordinary writ itself, Accordingly, the writ in this case barring the President and military officials from dropping respondent from the rolls of the Air Force is not "in aid of" (28 U.S.C. 1651(a)) the court of appeals' limited jurisdiction to review court-martial convictions under 10 U.S.C. 867.

In asserting jurisdiction over respondent's challenge to the action to drop from the rolls, the court of appeals reasoned that, because the All Writs Act authorizes the court "to grant extraordinary relief in a case that it cannot possibly review directly," the Act must at least empower the court "to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court." Pet. App. 6a. Respondent in turn argues (Br. in Opp. 3, 7) that the court of appeals has jurisdiction under the Act, because the action to drop him from the rolls exacted additional punishment that was not imposed by his adjudged court-martial sentence.

Both of those theories are flawed. They rest on the erroneous reasoning that, because the court of appeals could have reviewed respondent's court-martial sentence, it also could review, under the All Writs Act, a later personnel decision that never could have been part of the court-martial sentence. The All Writs Act does not, however, provide such a free-floating con-

tinuous source of jurisdiction. The Air Force's action to drop respondent from the rolls was not part of respondent's sentence imposed by court-martial under the Uniform Code of Military Justice, nor could have it been. Rather, it was initiated under Sections 1161(b)(2) and 1167 and was commenced only after respondent's conviction had become final. Moreover, respondent brought his petition against the President, the Secretary of Defense, and military officials who were not even parties to the court-martial. Resp. C.A. Br. 8 (seeking "a writ of mandamus or a writ of prohibition to preclude [the President, the Secretary of the Air Force and an Air Force Lieutenant General] from dropping [respondent] from the rolls of the Air Force or terminating his pay"). In those circumstances, the court of appeals' writ was not "in aid of," but reached well beyond, the court's limited jurisdiction under 10 U.S.C. 867.[5]

2. The court of appeals' assertion of jurisdiction in this case also is inconsistent with the requirement that a writ be "necessary or appropriate" (28 U.S.C. 1651(a)) in furtherance of a court's jurisdiction. "[T]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is con-

[5] Even apart from the lack of a statutory basis for the court of appeal's assertion of jurisdiction in this case, the court of appeals had no jurisdiction "to enjoin the President in the performance of his official duties." *Franklin* v. *Massachusetts*, 505 U.S. 788, 803 (1992) (quoting *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866)); see also *id.* at 827 (Scalia, J., concurring) (separation-of-powers principles bar "requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions").

trolling." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *Pennsylvania Bureau of Correction*, 474 U.S. at 43); see also *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943) ("[o]rdinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed"); 19 *Moore's Federal Practice*, *supra*, § 201.40 ("a writ may not be used * * * when another method of review will suffice").

Respondent sought extraordinary relief from the court of appeals to challenge an action to drop him from the Air Force's rolls. Congress, however, has assigned the responsibility for review of such claims, not to the military courts reviewing court-martial sentences under the Uniform Code of Military Justice, but to the Boards for Correction of Military Records, 10 U.S.C. 1552 and 1553, and the federal courts. See *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). A Board may review a member's "discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial)" or "correct any military record * * * when * * * necessary to correct an error or remove an injustice." 10 U.S.C. 1552(a)(1), 1553(a). Thus, the Board may review any personnel action affecting a servicemember's military record, such as an administrative discharge, the characterization of such discharge, a disciplinary action, or a performance evaluation.

Servicemembers dissatisfied with a Board decision may obtain further review in the federal courts. *Chappell*, 462 U.S. at 303; see, *e.g.*, *Doe* v. *United States*, 132 F.3d 1430, 1433 (Fed. Cir. 1997) (suit under Tucker Act, 28 U.S.C. 1491, for reinstatement, back pay, and correction of military records following officer's administrative discharge based on sexual molestation of daughter); *Thomas* v. *Cheney*, 925 F.2d 1407, 1411 (Fed. Cir.)

(challenge to action to drop from the rolls under Little Tucker Act, 28 U.S.C. 1346(a)(2)), cert. denied, 502 U.S. 826 (1991); *Roelofs* v. *Secretary of the Air Force*, 628 F.2d 594, 596 (D.C. Cir. 1980) (federal district court suit raising due process challenge to administrative discharge based on conviction of civilian offense).[6] Because respondent had an adequate means to challenge an administrative separation based on his prior court-martial conviction, the court of appeals' extraordinary writ was neither "necessary [n]or appropriate" (28 U.S.C. 1651(a)).[7]

3. Respondent also mistakenly relies (Br. in Opp. 4-7) on previous decisions of the court of appeals that invoked the All Writs Act "to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces." *Id.* at 5. The court of

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[6] In 1996, Congress directed the Secretary of Defense to establish an advisory committee to make recommendations and findings on the question whether Congress should vest a single court with jurisdiction to review administrative military personnel actions. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 551, 110 Stat. 318. On January 13, 1997, the Secretary forwarded to Congress the *Report of the Committee on Judicial Review of Administrative Military Personnel Actions of the Department of Defense*, which proposed a bill directing personnel actions primarily to the Boards for Correction of Military Records with centralized review in the Federal Circuit. Under the proposed legislation, administrative exhaustion is required if any aspect of the servicemember's claim is amenable to Board review. Congress has not acted on the proposal.

[7] Moreover, Congress has directed that the court of appeals "shall take action only with respect to matters of law." 10 U.S.C. 867(c). Because the court of appeals lacks fact-finding power, it is particularly inappropriate for the court of appeals to assert original jurisdiction over administrative personnel actions that often will entail the resolution of factual disputes.

appeals' assertion of "broad responsibility with respect to administration of military justice," Pet. App. 5a, cannot confer jurisdiction where none exists. The court of appeals is an Article I court with strictly circumscribed jurisdiction. It has not been empowered to provide broad oversight of all issues arguably related to military justice.[8]

Contrary to respondent's assertion (Br. in Opp. 5), this Court in *United States* v. *Augenblick*, 393 U.S. 348 (1969), did not "endorse[]" *United States* v. *Bevilacqua*, 39 C.M.R. 10 (C.M.A. 1968). In *Bevilacqua*, the Court of Military Appeals considered a challenge to a court-martial conviction that was not subject to appellate review under 10 U.S.C. 867 on the theory that the court of appeals could "accord relief to an accused who has palpably been denied constitutional rights in any court-martial." *Id.* at 11-12. In *Augenblick*, the Court reserved the question whether the Court of Claims could collaterally review a court-martial conviction and held that the Court of Claims erred in its ruling on the merits. 393 U.S. at 351-352. The Court also observed that the Court of Military Appeals "apparently" could

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[8] Respondent similarly argues that history of 10 U.S.C. 867 confirms that Congress established the court of appeals to play a "key role * * * in enhancing the fairness of military justice." Br. in Opp. 6; see also *id.* at 7, 15. Congress, however, has always confined the court of appeals' jurisdiction to the review of specified sentences imposed by court-martial. Act of May 5, 1950, Ch. 169, Arts. 66-67, 64 Stat. 128-130 (establishing Court of Military Appeals to review cases in which a court-martial sentence affects a general or flag officer or extends to death, dismissal of an officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more); see also H.R. Rep. No. 491, 81st Cong., 1st Sess. 7, 32 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 3, 28-29 (1949).

have reviewed the defendant's challenge to his conviction under *Bevilacqua*. *Id.* at 350. The Court did not, however, indicate its approval of *Bevilacqua*, which, in any event, did not even mention the All Writs Act and was not at that time subject to this Court's review. See note 4, *supra*.

4. The court of appeals' jurisdictional holding cannot be justified on the theory that respondent's personnel claim is "pendent" to his now-moot claim that he received improper medical treatment while in confinement. Pet. App. 9a. Although a court does not lose pendent jurisdiction simply because the claim within the court's original jurisdiction becomes moot after the filing of a complaint, *Rosado* v. *Wyman*, 397 U.S. 397, 402-405 (1970), none of the requirements for pendent jurisdiction is met in this case.

As an initial matter, the court of appeals lacked power under the All Writs Act to review respondent's medical treatment claim, because that claim was not within the court's existing or potential appellate jurisdiction. Respondent's conviction was already final when he filed his petition for extraordinary relief in the court of appeals under 10 U.S.C. 871(c)(1). Moreover, because the court of appeals may act only with respect to "the findings and sentence as approved by the convening authority" (10 U.S.C. 867(c)), the court of appeals' "jurisdiction does not extend to the review of medical determinations made by officials at the United States Disciplinary Barracks." Pet. App. 23a-24a (opinion of Air Force Court of Criminal Appeals); see also note 7, *supra*.

Moreover, respondent's challenge to the constitutionality of a personnel action to drop from the rolls under 10 U.S.C. 1161(b) and 1167 (Supp. II 1996) may not be reviewed by the CAAF on a theory of pendent

appellate jurisdiction. It is doubtful that the CAAF, whose jurisdiction Congress specifically limited to the review of court-martial sentences reviewed by the Court of Criminal Appeals (10 U.S.C. 867(a)), and nothing else, has authority to assert pendent appellate jurisdiction over other types of claims. Cf. *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995) (reserving the question whether "court of appeals, with jurisdiction over one ruling, [may] review, conjunctively, related rulings that are not themselves independently appealable"). Even assuming that the CAAF has such power, respondent's personnel challenge is not an appellate matter, since it was not raised in the Court of Criminal Appeals, Pet. App. 9a, and is not sufficiently related to his claim that he was denied proper medical treatment while in confinement such that the claims could be considered pendent. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966) (the "claims must derive from a common nucleus of operative fact," and are such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding"). Thus, respondent's medical treatment claim provides no jurisdictional basis for the court to hear a personnel claim and issue a writ barring an action to drop respondent from the rolls of the Air Force.[9]

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[9] Nor would even the most expansive theory of pendent jurisdiction justify issuance of a writ against the President and military officials over whom the court lacked independent jurisdiction. See generally *Finley* v. *United States*, 490 U.S. 545, 551 (1989) (assertion of "pendent party" jurisdiction must be preceded by "an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim") (quoting *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 (1978)); cf. 28 U.S.C. 1367(a) (providing for

II. THE DOUBLE JEOPARDY AND *EX POST FACTO* CLAUSES DO NOT APPLY TO THE PRESIDENT'S EXERCISE OF AUTHORITY TO DROP AN OFFICER FROM THE ROLLS OF THE ARMED FORCES

The court of appeals erred in holding that an action to drop an officer from the rolls on the basis of a prior court-martial conviction violated respondent's rights under the Double Jeopardy and *Ex Post Facto* Clauses. An action to drop from the rolls is a civil, administrative proceeding that permits the military to separate an officer whose criminal misconduct renders him unfit to serve in the military. As such, an action to drop from the rolls does not implicate the Double Jeopardy and *Ex Post Facto* Clauses.

1. The Double Jeopardy Clause of the Fifth Amendment provides that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The *Ex Post Facto* Clause, Art. I, § 9, Cl. 3, provides that "[n]o * * * ex post facto Law shall be passed." Those constitutional provisions apply only to laws or proceedings that impose *criminal* punishment. This Court has "long recognized that the Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, in common parlance, be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997) (internal quotation marks and citation omitted). Similarly, "[i]t always has been

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supplemental federal court jurisdiction over pendent parties when claims are "so related * * * that they form part of the same case or controversy").

considered that [the *Ex Post Facto* Clause] forbids * * * *penal* legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952) (emphasis added); see also *Kansas* v. *Hendricks*, 117 S. Ct. 2072, 2081 (1997) (Double Jeopardy and *Ex Post Facto* Clauses apply to "criminal proceedings"); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (*Ex Post Facto* Clause).

The question whether a particular sanction is criminal or civil is initially a matter of legislative intent. *Hudson*, 118 S. Ct. at 493. If the legislature intends to create a civil sanction, that is the end of the matter unless there is "the clearest proof" that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Ibid.* (internal quotation marks, brackets, and citations omitted); see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2081-2082; *United States* v. *Ursery*, 518 U.S. 267, 288 (1996); *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980).

In conducting the latter inquiry, the factors identified in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and subsequent cases provide guidance. Those factors include whether the sanction historically has been regarded as punishment; whether it involves an affirmative disability or restraint; whether it promotes the traditional twin goals of punishment—retribution and deterrence; whether it is proportionate to a nonpunitive purpose; and whether it applies only upon a finding of *scienter*. See, *e.g.*, *Hudson*, 118 S. Ct. at 495-496; *Kansas* v. *Hendricks*, 117 S. Ct. at 2082-2083. That the conduct being sanctioned may also constitute a crime or that the sanction was intended to deter similar conduct is "insufficient" to render a sanction "criminal"

or "punitive." *Hudson*, 118 S. Ct. at 496; see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2082; *Ursery*, 518 U.S. at 292.

2. Under that analytical framework, an action to drop an officer from the rolls because of a prior criminal conviction is not subject to double jeopardy and *ex post facto* restrictions.

a. Congress clearly intended an action to drop an officer from the rolls under 10 U.S.C. 1161(b)(2) and 1167 (Supp. II 1996) to be a civil remedy. Before 1996, Section 1161 had authorized the President to drop from the rolls officers who were absent without leave or convicted by a civilian court. In 1996, Congress amended Section 1161 and enacted Section 1167 to extend that authority to certain officers convicted by courts-martial; it did so as part of Title V of the National Defense Authorization Act for Fiscal Year 1996, which is entitled "Military Personnel Policy." Pub. L. No. 104-106, Tit. V, §§ 501-574, 110 Stat. 290-356. Similarly, Sections 1161(b)(2) and 1167 are located in Chapter 59 of Title 10 of the U.S. Code, which comprises various provisions relating to the administrative separation of servicemembers. 10 U.S.C. 1161-1177 (1994 & Supp. II 1996). By contrast, a "*punitive* separation" of an officer may occur only when a general court-martial imposes a sentence of dismissal under the UCMJ. See R.C.M. 1003(b)(9) (emphasis added). Congress's classification of an action to drop an officer from the rolls as an administrative personnel action, rather than as a feature of a court-martial sentence under the UCMJ, reveals that Congress regarded that action to be civil in character. See *Kansas* v. *Hendricks*, 117 S. Ct. at 2082 (Kansas's placement of involuntary commitment proceedings in State's "probate code, instead of the criminal code,"

supported finding that legislature intended proceedings to be civil).

For those reasons, respondent errs in contending (Br. in Opp. 10-13; see also Pet. App. 14a) that Sections 1161(b)(2) and 1167 are punitive merely because they were enacted as part of the same comprehensive public law that amended Article 57(a) and added Article 58b to the UCMJ—provisions that the court of appeals regarded as criminal punishment subject to the *Ex Post Facto* Clause. *United States* v. *Gorski*, 47 M.J. 370, 372-373 (1997).[10] Congress added Sections 1161(b)(2) and 1167 to broaden the scope of a pre-existing administrative action to drop an officer from the rolls, and did so as part of Title V of the National Defense Authorization Act for Fiscal Year 1996, which concerns military personnel matters. By contrast, Congress amended Article 57(a) and added Article 58b as part of Title XI of the Act, which contains amendments to the UCMJ. Pub. L. No. 104-106, Tit. XI, §§ 1121, 1122, 110 Stat. 462-463. Moreover, the National Defense Authorization Act for Fiscal Year 1996 spans 518 pages in the *Statutes at Large* and addresses in 57 separate Titles a variety of unrelated issues affecting the Department of Defense, such as procurement, health care, departmental organization and management, and national security policy. Particularly in those circumstances, Congress's intent in amending the UCMJ has no bearing on Congress's intent in legislating the military's personnel policies.

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[10] Article 58b mandates the forfeiture of military pay following a prescribed court-martial sentence of a servicemember; Article 57(a) provides that the effective date of any forfeiture of pay or reduction in grade that is included in a court-martial sentence of a servicemember is the earlier of 14 days after the date a sentence is adjudged or the date on which the convening authority approves the sentence. See 10 U.S.C. 857(a)(1), 858b (1994 & Supp. II 1996).

b. There is no indication, much less "the clearest proof," *Hudson*, 118 S. Ct. at 493, *Kansas* v. *Hendricks*, 117 S. Ct. at 2082, that an action to drop an officer from the rolls is so punitive in purpose or effect as to negate Congress's intent to establish a civil, administrative scheme.

First, dropping from the rolls has historically been regarded as remedial. As Judge Gierke observed in his dissent, "[d]ropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial." Pet. App. 18a. It has long been recognized that "the authority to drop is a special power conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered." W. Winthrop, *Military Law and Precedents* 746 (2d ed. 1920); 36 Op. Atty Gen. 186, 188 (1930) (the purpose of an action to drop an officer from the rolls is "not to impose additional punishment upon naval officers convicted of crime, but rather to promote the efficiency of the Navy and to maintain the high standard of its officer personnel by providing that officers who fail to maintain a certain standard of conduct may be dropped from the rolls and rendered ineligible for reappointment"); see also Art. 118 of the Articles of War, *reprinted in Digest of Davis' Military Law of the United States and The Manual for Courts-Martial* 135 (1917) (providing that "in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in

a prison or penitentiary for three months after final conviction by a court of competent jurisdiction").

Consistent with the history of an action to drop from the rolls as it has existed since 1870, Sections 1161(b)(2) and 1167 further the legitimate remedial objective of separating officers who are not performing any service for the military (because they are in confinement) or whose continuation in active service is incompatible with good order and discipline. As this Court has observed, "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." *Chappell* v. *Wallace*, 462 U.S. at 300. Sections 1162(b)(2) and 1167 permit the President to enforce standards of behavior necessary to preserve the military mission. An administrative separation based on a court-martial conviction is thus "an important remedy" that "promote[s] military readiness and efficiency by separating from service those enlisted persons who, if retained, would lower performance and morale." *United States* v. *Rice*, 109 F.3d 151, 156 (3d Cir. 1997).

Second, the non-punitive nature of an action to drop an officer from the rolls is highlighted by the special status of an officer's military service. "[A] military officer holds a particular position of responsibility and command in the Armed Forces." *Parker* v. *Levy*, 417 U.S. 733, 744 (1974); accord *Orloff* v. *Willoughby*, 345 U.S. 83, 91 (1953). "[T]he established relationship between enlisted military personnel and their superior officers * * * is at the heart of the necessarily unique structure of the Military." *Chappell* v. *Wallace*, 462 U.S. at 300; see also *Parker* v. *Levy*, 417 U.S. at 744 (The Army's "law is that of obedience. No question can be left open as to the right to command in the officer.") (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)). When

an officer has served an extended period of confinement following a final conviction by court-martial, his leadership authority in the military chain of command is seriously undermined. Congress therefore rationally determined that an action to drop such officer from the military's rolls is a remedial measure that eliminates the problems inherently associated with the presence of a convicted officer within the military leadership's ranks.

Third, an action to drop from the rolls is not rendered a penal proceeding because it is premised on a criminal conviction. Congress may impose both a civil and a criminal sanction for the same conduct. "It is well settled that Congress may impose both a criminal and a civil sanction in respect to the same act or omission. By itself, the fact that a * * * statute has some connection to a criminal violation is far from the clearest proof necessary to show that a proceeding is criminal." *United States* v. *Ursery*, 518 U.S. at 292 (internal quotation marks and citation omitted); see also *Helvering* v. *Mitchell*, 303 U.S. 391, 397-398 (1938) (no double jeopardy bar to civil and criminal sanction for tax evasion). Thus, the Court in *Hudson* held that the Double Jeopardy Clause was not implicated by the imposition of monetary penalties and an occupational debarment sanction that was based on conduct that formed the basis of an indictment under criminal banking laws. See 118 S. Ct. at 496 (the fact that "the conduct for which OCC sanctions are imposed * * * formed the basis for petitioner's indictments * * * is insufficient to render the money penalties and debarment sanctions criminally punitive"). The same conclusion applies here.

It is therefore of no constitutional significance that respondent's court-martial conviction triggered the action to terminate his military status and service. An

officer's criminal conviction may result in a variety of adverse collateral consequences that serve civil remedial goals, including administrative separation from service (10 U.S.C. 1181), revocation of a security clearance (Exec. Order No. 12,968, § 3.1(b), 3 C.F.R. 391 (1995)), or non-selection for promotion (10 U.S.C. 617(b), 630-632 (1994 & Supp. II 1996)). The fact that those personnel actions may directly follow from a criminal conviction does not transform those remedial sanctions into criminal penalties. See *Koon* v. *United States*, 518 U.S. 81, 110 (1996) ("[M]any public employees are subject to termination and are prevented from obtaining future government employment following conviction of a serious crime, whether or not the crime relates to their employment."); 10 U.S.C. 504 (generally barring felons from enlisting in the military); cf. *DeVeau* v. *Braisted*, 363 U.S. 144, 159-160 (1960) (plurality opinion of J. Frankfurter) (noting federal and state governments' "wide utilization of disqualification of convicted felons for certain employments closely touching the public interest" and rejecting *ex post facto* challenge to New York's bar of ex-felons from union office); *FDIC* v. *Mallen*, 486 U.S. 230 (1988) (rejecting due process challenge to suspension of indicted bank officer).

The courts of appeals have consistently rejected arguments that termination of military service constitutes criminal "punishment" for purposes of the Double Jeopardy Clause. See *United States* v. *Rice*, 109 F.3d at 153 (rejecting defendant's claim that a "general discharge was punishment and the functional equivalent of a criminal prosecution barring subsequent prosecution for the same offense"); *United States* v. *Smith*, 912 F.2d 322, 323-324 (9th Cir. 1990) (rejecting claim that administrative discharge in lieu of court-martial barred sub-

sequent criminal charges arising out of same conduct); cf. *United States* v. *Reyes*, 87 F.3d 676, 681 (5th Cir. 1996) ("To construe the Double Jeopardy Clause to include [adverse employment action] as 'punishment' would confer on governmental employees rights against subsequent criminal prosecution—certainly the central thrust of the Double Jeopardy Clause—that private employees do not have. Such unequal protection from criminal prosecution is inconsistent with all our traditions."). The same conclusion applies here to the administrative action of dropping an officer from the rolls.

Fourth, an action to drop respondent from the military's rolls does not constitute criminal punishment on the theory that such action results in a stigmatizing loss of military pay and allowances, and possibly the denial of veterans' benefits. See Pet. App. 14a; Br. in Opp. 12-14. The loss of pay and allowances that results from an action to drop from the rolls is indistinguishable in purpose and effect from the loss of pay and allowances that inevitably results from any involuntary separation of employment from the military, including a separation because of a defective enlistment, drug abuse, the convenience of the government, unsatisfactory performance of military duty, or misconduct that is not a criminal offense. 32 C.F.R. Pt. 41, App. A; see also Air Force Instruction 36-3206. In none of those circumstances would any stigma associated with the termination of military status and pay constitute criminal punishment. Cf. *Parker* v. *Levy*, 417 U.S. at 750 ("Forfeiture of pay, reduction in rank, and even dismissal from the service [resulting from a court-martial] bring to mind the law of labor-management relations as much as the civilian criminal law."). Indeed, an action to drop from the rolls does not result in a characterization of service by the military. See Pet. App. 26a (notifying respondent that

his "service will not be characterized" once dropped from the Air Force's rolls); see also *Helmich* v. *Nibert*, 543 F. Supp. 725, 727-728 (D. Md.) ("[S]eparation * * * by dropping * * * from the rolls * * * is purely a non-disciplinary administrative action which carries no connotations, good or bad.") (citation omitted), aff'd, 696 F.2d 990 (4th Cir. 1982); cf. 32 C.F.R. Pt. 41, App. A, pt. 2, C.3.c (authorizing an action to drop an enlisted member from the rolls "when such action is authorized by the Military Department concerned and a characterization of service * * * is not authorized or warranted").

This Court has long since rejected the notion that a military officer has "any vested interest or contract right in his office of which Congress could not deprive him." *Crenshaw* v. *United States*, 134 U.S. 99, 104 (1890). It is similarly settled that "revocation of a privilege voluntarily granted * * * is characteristically free of the punitive criminal element." *Hudson*, 118 S. Ct. at 496 (quoting *Helvering* v. *Mitchell*, 303 U.S. at 399 & n.2); see also *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960) (rejecting *ex post facto*, bill of attainder, and Sixth Amendment challenges to provision terminating Social Security benefits of deported aliens based on membership in Communist Party, because "the sanction is the mere denial of a noncontractual governmental benefit" that imposes "[n]o affirmative disability or restraint," and "certainly nothing approaching the 'infamous punishment' of imprisonment"). The denial of military privileges associated with the separation from military office therefore hardly establishes "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 118 S.

Ct. at 493 (internal quotation marks, brackets, and citations omitted).

3. The absence of any sound basis for treating an action to drop from the rolls as a criminal proceeding subject to the restrictions of the Double Jeopardy and *Ex Post Facto* Clauses is reinforced by this Court's repeated recognition that "the military in important respects remains a 'specialized society separate from civilian society," *Weiss*, 510 U.S. at 174 (quoting *Parker* v. *Levy*, 417 U.S. at 743), whose essential function is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955); see also *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). In vesting Congress with the power to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, "the Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" *Weiss*, 510 U.S. at 177 (quoting *Chappell* v. *Wallace*, 462 U.S. at 301). The court of appeals' decision does not reflect consideration of those factors, and it similarly slights the judgments of the political branches in this area. See, *e.g.*, *Weiss*, 510 U.S. at 177; see also *Loving* v. *United States*, 517 U.S. 748, 768-773 (1996); *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986). Consistent with Congress's constitutional powers over military affairs (and the President's authority to commission officers in the first instance, U.S. Const. Art. II, § 3), Congress authorized the President to invoke a remedial procedure to remove a convicted officer from the military chain of command. The court of appeals erred in concluding that Congress

is constitutionally prohibited from making that political judgment.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

JAMES T. GOLDSMITH, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

In Section 563 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate the military status and pay of, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. §§ 1161(b)(2), 1167. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. §§ 1161(b)(2) and 1167.

2. Whether the President's exercise of authority under 10 U.S.C. §§ 1161(b)(2) and 1167 in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

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TABLE OF AUTHORITIES

Supreme Court Cases:

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Burgess v. Salmon, 97 U.S. 381 (1878) 22

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Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 16

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Ex Parte Peru, 318 U.S. 578 (1943) 7

Finley v. United States, 490 U.S. 545 (1989) 15

FTC v. Dean Foods Co., 384 U.S. 597 (1966) 13

Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488 (1997) 18, 19, 31, 32

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 19

La Buy v. Howes Leather Co., 352 U.S. 249 (1957) 7
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Parker v. Levy, 417 U.S. 733 (1974) 7, 13
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Will v. United States, 389 U.S. 90 (1967) 7
Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) 11

Federal Cases:

Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961) 34
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Act of Apr. 2, 1918, ch. 39, 40 Stat. 501 20

Act of June 15, 1968, Pub. L. 90-340, 82 Stat. 178 10

Act of Jan. 19, 1911, ch. 22, 36 Stat. 894 . . . . . 20, 22

Full Committee Hearings on H. R. 3341 and H. R. 4080, 81st Cong., 1st Sess. 1328 (1949) 10

H. Conf. Rep. No. 450, 104th Cong., 1st Sess. (1996) 16, 25

H. Rep. No. 131, 104th Cong., 1st Sess. (1995). 24

H. Rep. No. 1480, 90th Cong., 2d Sess. (1968) 11

National Defense Authorization Act for Fiscal Year1996, Pub. L. 104-106, 110 Stat. 186 . . . . . *passim*

National Defense Authorization Act for Fiscal Year1997, Pub. L. 104-201, 110 Stat. 2658 19

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S. Rep. 486, 81st Cong., 2d Sess. (1950) 20

S. Rep. No. 112, 104th Cong., 1st Sess. (1995) 24

Rep. Nos. 209, 309, 65th Cong., 2d Sess. (1918). 20

Rep. No. 966, 61st Cong., 2d Sess. (1911). 22

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Air Force Instruction 36-3202 35

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D. Siegel, *Practice Commentary*, 28 U.S.C.A. § 1367 note (1993) 15

Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 Duke L.J. 41 (1966) 34

General Accounting Office, *Need for and Uses of Data Recorded on DD Form 214 Report of Separation from Active Duty* (Jan 23, 1975) (FPCD-75-126) 35

Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 Mil. L.R. 1 (1973) 34, 35, 36

Manual for Courts-Manual, United States, 1984, Part V 27

Rule for Courts-Martial 1003 . . . . . 21, 32, 38

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IN THE

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JAMES T. GOLDSMITH, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, reported at 48 M.J. 84 (1998), is located at Pet. App. 1a-19a. The order of the United States Air Force Court of Criminal Appeals is unreported. It is located at Pet. App. 22a-24a. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction and sentence is unreported and is located at Pet. App. 30a-38a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at Pet. App. 39a-42a.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is accepted except where noted.

Respondent was convicted of various offenses based on two sexual relationships, one occurring in 1989 and the other in 1993. At his court-martial, respondent faced a maximum punishment of a dismissal, confinement for 10 years, forfeiture of all pay and allowances, and a fine. A dismissal would cause automatic forfeiture of Veterans Affairs (hereinafter VA) benefits, such as medical care for his terminal HIV affliction. After considering the evidence and respondent's situation, the court-martial sentenced respondent on March 4, 1994 to six years confinement and to forfeit $2,500 pay per month for 72 months. No dismissal was adjudged. Respondent began serving his sentence to confinement on March 4, 1994. On November 20, 1995, the Air Force Court of Criminal Appeals affirmed the conviction. Throughout his confinement, respondent received the difference between his full pay and the adjudged forfeitures, in accordance with his court-martial sentence.

On February 10, 1996, Congress enacted 10 U.S.C. §§ 1161(b)(2) and 1167, thereby creating a new means for the

President to drop an officer from the rolls (hereinafter DFR) of the Armed Forces, namely when an officer is sentenced by a court-martial to confinement for more than six months, with the sentence having become final and the member having served at least six months confinement.

On September 10, 1996, respondent was notified that he was considered but not selected for promotion to the grade of lieutenant colonel. J.A. 1. He was also notified that he had been selected by the Major Selective Continuation Board to remain on active duty until he first became eligible to retire as an officer at 20 years of service. The Air Force informed respondent that he could accept or decline this continued active service option. If respondent declined continuation on active duty, he would receive an honorable discharge with separation pay, in addition to further benefits, such as transition assistance. Air Force Instruction (hereinafter AFI) 36-3207, paragraph 3.4. and A.2.1.1. On or about September 26, 1996, respondent elected to accept continuation on active duty, thus incurring a one-year active duty service commitment from the date the continuation period began. J.A. 4.

Despite being continued on active duty, the respondent was notified by the Air Force on December 18, 1996, that it was initiating a DFR action pursuant to Section 563 of the National Defense Authorization Act for Fiscal Year 1996 and AFI 36-3207, paragraph 4.2.3. Pet. App. 25a-27a. The notification letter unequivocally states the DFR action would cost respondent his pay, his military status, and his VA benefits. *Id.*

On October 10, 1997, respondent was released from the Disciplinary Barracks at Fort Leavenworth, Kansas, following the completion of his sentence to confinement. He is currently performing military duties for the 37th Civil Engineering Squadron at Lackland Air Force Base, Texas.

SUMMARY OF ARGUMENT

The court-martial sentence imposed on respondent on March 4, 1994 did not include such authorized punishments as a dismissal—a separation with ignominy, nor total forfeitures of pay and allowances, with the resultant loss of Veterans Affairs (VA) Department benefits, including future VA medical care for his HIV infection. A statute that went into effect over two years later (and between 3 to 7 years after the commission of his offenses) sought to remove certain military prisoners as a direct sanction for their court-martial convictions by use of a DFR action. The DFR action imposed severe punishments akin to those respondent avoided in his general court-martial. VA regulations stigmatize prisoners who are released under a DFR action in the same manner (separated under dishonorable conditions) as officers receiving a dismissal as part of the adjudged sentence at a general court-martial. 38 C.F.R. §§ 3.12(c)(2), (d)(3), (k)(3).[1]

The retroactive punishment imposed by the DFR action violated the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution of the United States. Using its expertise in military matters, the Court of Appeals for the Armed Forces properly exercised jurisdiction under the All Writs Act to bar the retroactive, multiple punishment and to insure that only the adjudged and affirmed original sentence was carried out.

ARGUMENT

I. THE COURT OF APPEALS FOR THE ARMED FORCES HAD JURISDICTION UNDER THE ALL WRITS ACT TO BAR THE MILTARY FROM DROPPING RESPONDENT FROM THE ROLLS OF THE AIR FORCE.

[1] The reference to DFR actions in subparagraph (3) of 38 C.F.R. § 3.12(k) applies only to enlisted personnel.

Congress overhauled the military justice system by enacting the Uniform Code of Military Justice (hereinafter UCMJ) in 1950. The UCMJ created a civilian appellate court, now called the U.S. Court of Appeals for the Armed Forces (hereinafter court of appeals, or CAAF). The UCMJ also created intermediate military appellate courts, now called service Courts of Criminal Appeals.

Military appellate courts review court-martial convictions if the approved sentence satisfies the jurisdictional requirements in the UCMJ or if the service Judge Advocate General requests review. Under Article 66, UCMJ, 10 U.S.C. § 866, the Air Force Court of Criminal Appeals (hereinafter AFCCA) exercised direct review jurisdiction over respondent's court-martial because his sentence exceeded one year of confinement. Under Article 67, UCMJ, 10 U.S.C. § 867, the court of appeals had potential jurisdiction over this case once the Air Force Court issued its opinion.[2] The court of appeals did not review respondent's case because neither he nor The Judge Advocate General sought direct review of the decision of the Air Force court below.

The All Writs Act permits federal courts, including military appellate courts, to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In the mid-1960s, the predecessor Court of Military Appeals held it could collaterally review military justice actions under the All Writs Act, 28 U.S.C. § 1651(a). *United States v. Frischholz,* 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966); *Gale v. United States,* 17 U.S.C.M.A. 40, 37

[2] The service Judge Advocate General could order the case sent to the court of appeals or respondent could petition for review under Articles 67(a)(2) and (a)(3), respectively.

C.M.R. 304 (1967); *United States v. Bevilacqua,* 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968). This Honorable Court agreed the predecessor court had jurisdiction under the All Writs Act. *Noyd v. Bond,* 395 U.S. 683, 695 n. 7 (1969). The court of appeals also advised the service Courts of Military Review, as they were then known, that they too possessed jurisdiction under the All Writs Act. *United States v. Dettinger,* 7 M.J. 216, 220 (C.M.A. 1979).

A. Several well-acknowledged bases exist to support CAAF's exercise of jurisdiction under the All Writs Act.

As applicable here, the military appellate courts generally have articulated several doctrinal reasons for application of the All Writs Act.

First, the military appellate courts applied the All Writs Act to cases involving their UCMJ statutory jurisdiction. *United States v. Frischholz,* 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966)(Court of Military Appeals has jurisdiction to consider writ of error *coram nobis* after completion of appellate review of sentence that qualified for Article 67 review). This is traditional All Writs Act jurisdiction found in the federal judicial system.

Second, military appellate courts have applied the All Writs Act to cases involving the administration or supervision of military justice within their potential jurisdiction when the court-martial proceedings would violate the accused's rights under the Constitution or the UCMJ. *See e.g. U.S. Navy-Marine Corps Court of Military Review v. Carlucci,* 26 M.J. 328 (C.M.A. 1988); *Unger v. Ziemniak,* 27 M.J. 349 (C.M.A. 1989); *Murray v. Haldeman,* 16 M.J. 74 (C.M.A. 1983); *McPhail v. United States,* 1 M.J. 457 (C.M.A. 1976). *Also compare San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996) *with ABC, Inc. v. Powell,* 47 M.J. 363 (1997)(press seeks writ). This view comports with All

Writs Act practice in the federal judicial system. This Honorable Court has held that federal courts have jurisdiction under the All Writs Act when in aid of their potential jurisdiction. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 25 (1943)(Court of Appeals jurisdiction is not confined to issuance of writs in aid of jurisdiction already acquired but extends to those areas which are within its jurisdiction although no appeal has been perfected); *Ex Parte Peru,* 318 U.S. 578 (1943). Courts also have jurisdiction under the All Writs Act over supervisory matters. *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957). This Honorable Court extended supervisory review to criminal cases. *Will v. United States,* 389 U.S. 90 (1967).

As pointed out in *In Re Von Bulow,* 828 F.2d 94 (2d Cir. 1987), use of the All Writs Act may be particularly important in cases involving, as in *Goldsmith,* significant novel questions of the first impression, *Id.* at 97, or resolution of important, undecided issues that will forestall future error in the trial courts, eliminate uncertainty, and add importantly to the efficient administration of justice. *Id.* at 98. This principle is significant in the military environment. The UCMJ is designed to promote military efficiency across the globe, and it must operate effectively in a war. *Curry v. Secretary of Army,* 595 F.2d 873, 877 (D.C. Cir. 1978). Extraordinary relief through the All Writs Act can quickly confirm the law for the benefit of all military members to promote good order and discipline in the armed forces, particularly on critical morale and discipline issues. Thus, service members learned that they could not use personal moral scruples to refuse orders related to an unpopular war, as was the case for Captains Noyd (*Noyd, supra*) and Levy (*Parker v. Levy,* 417 U.S. 733 (1974)); that they could not refuse orders to submit to urinalysis drug testing, as was the case for Lieutenant Unger (*Unger, supra*); that they could not

evade a court-martial for off-base drug offenses, as was the case for Boatsmain's Mate Murray (*Murray, supra*); or that the armed forces could not ignore Supreme Court rulings on the lack of court-martial jurisdiction over off-base offenses, as was the case for Sergeant McPhail (*McPhail, supra*). Indeed, in his *amicus* brief in *Carlucci,* 26 M.J. at 333-34, The Judge Advocate General of the Air Force acknowledged that a quick decision under All Writs Act jurisdiction promotes good order and discipline by providing guidance on pending cases.

In deciding if a military appellate court may invoke jurisdiction under the All Writs Act, it is appropriate to observe the line of cases in the federal judicial system permitting interlocutory appeals before final judgments in criminal cases. This Honorable Court has permitted a criminal defendant to bypass the final judgment rule with an interlocutory appeal when the defendant asserted a right which would effectively be destroyed if not vindicated at trial. *United States v. MacDonald,* 435 U.S. 850, 860 (1978) (interlocutory appeal on speedy trial claim denied). Thus, the Supreme Court permitted an interlocutory appeal for a colorable claim of double jeopardy. *Abney v. United States,* 431 U.S. 651 (1977). Military courts lack interlocutory appeal procedures for an accused to resolve a colorable claim of double jeopardy and *ex post facto* violations. However, as in *Goldsmith,* it can invoke jurisdiction under the All Writs Act to accomplish the same goal and still be in aid to its potential jurisdiction.

Recent *ex post facto* cases have come to the Supreme Court via habeas corpus, typically under 28 U.S.C. § 2241. *Lynce v. Mathis,* 519 U.S. 433 (1997); *Collins v. Youngblood,* 497 U.S. 37 (1990). This habeas corpus statute does not apply to the military appellate courts. These courts, however, can use the All Writs Act in exercise of their jurisdiction to achieve a similar result. Invoking the All Writs Act enables a

service member to litigate a legal and practical right that would otherwise be destroyed, consistent with the holdings in *Abney* and *MacDonald. See e.g. McCray v. Grande,* 38 M.J. 657 (A.C.M.R. 1993)(habeas corpus sets free a prisoner held past his release date).

This Honorable Court has recognized a federal court's supervisory authority. Although not an All Writs Act case, *United States v. Hasting,* 461 U.S. 499, 505 (1983) held that federal courts may use supervisory powers to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and to design remedies to deter illegal conduct. Congress granted broad discretion to CAAF to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces. *Gale v. United States,* 17 U.S.C.M.A. 40, 37 C.M.R. 304, 306 (1967). In *Gale,* the then Court of Military Appeals focused on Congressional intent to provide the Court of Military Appeals with general supervisory authority over the administration of military justice when 10 U.S.C. § 867 was enacted. *Id.* The importance of providing civilian review of military justice matters was emphasized by Representative Philbin, a member of the Committee on Armed Services, on the House floor when he stated:

> This court will be completely detached from the military in every way. It is entirely disconnected with [sic] the Department of Defense or any other military branch, completely removed from outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the topmost rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. 95 Cong. Rec. 5726 (1949).

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The key role envisioned by Congress in enhancing the fairness of military justice was stressed by the Hon. Overton Brooks during the full committee hearings on H. R. 4080. Rep. Brooks stated that

> [t]he Court of Military Appeals, which finally decides questions of law, is the court of last resort for each of the armed forces and also acts with the Judge Advocates General of the three Departments as an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

Full Committee Hearings on H. R. 3341 and H. R. 4080, 81st Cong., 1st Sess. 1328 (1949).

In 1968, Congress amended Article 67(a)(1) to clarify the status of the Court of Military Appeals, stating "[t]here is a United States Court of Military Appeals established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense." Act of June 15, 1968, Pub. L. 90-340, 82 Stat. 178. The House Committee on Armed Services noted:

> One of the purposes of this bill is to make it abundantly clear in the law that the Court of Military Appeals is a court, although it is a court under article I of the Constitution. There has been some claim that the court, having been put under the Department of Defense for administrative purposes, is in effect an administrative agency. If it had such status, it would not be able to question any of the provisions of the Manual for Courts-Martial since the manual had been promulgated by Presidential order. The bill makes it clear that the Court of Military Appeals is a court and does have the power to question any provision of the manual or any executive regulation or action as freely as though it were a court constituted under article III of the Constitution. H. Rep. No. 1480, 90th Cong., 2d Sess. 2 (1968).

Third, the military courts have applied the All Writs Act to issue orders to commanders as might be necessary or appropriate to protect and effectuate or to prevent the frustration of orders and mandates it has previously issued in exercise of their jurisdiction. *United States v. Montesinos,* 28 M.J. 38 (C.M.A. 1989); *United States v. Bullington,* 13 M.J. 184 (C.M.A. 1982); *United States v. Mahoney,* 36 M.J. 679 (A.F.C.M.R. 1992)(Commander defied military judge's order). This practice comports with practice in the federal judicial system. *United States v. New York Telephone Co.,* 434 U.S. 159, 172 (1977)(District court had authority under Fed. R. Crim. P. 41 to authorize installation of pen registers and authority under All Writs Act to enforce the order against third party); *Adams v. United States ex rel. McCann,* 317 U.S. 269, 273 (1942)(Federal Court can avail itself of all writs in the performance of its duties, when the use of such historical aids is calculated in its sound judgment to achieve the ends of justice). *See also Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787 (1987)(The exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce orders, a subject that directly concerns the functioning of the judiciary).

B. CAAF properly exercised jurisdiction by invoking its supervisory power and its duty to protect and effectuate the affirmed sentence.

CAAF had jurisdiction under the All Writs Act to consider respondent's colorable claims of violations of the *Ex Post Facto* and Double Jeopardy Clauses. The court of appeals premised its All Writs Act jurisdiction on its

supervisory power over the administration of military justice for cases within its potential jurisdiction. Pet. App. 5a. The Air Force Court of Criminal Appeals had already exercised jurisdiction over the case and affirmed respondent's sentence in an unpublished opinion. Respondent could have petitioned for discretionary review of his conviction under Article 67(a)(3) after the AFCCA opinion. Thus, CAAF had potential jurisdiction over respondent's court-martial.

In Part I of its opinion, CAAF noted that it had a limited duty to insure that respondent was not subject to cruel and unusual punishment under Article 55, UCMJ, 10 U.S.C. § 855, by being deprived of medication to combat his infection of the human immunodeficiency virus.[3] Pet. App. 7a. CAAF's opinion in *Goldsmith* is less explicit on its jurisdictional basis under the All Writs Act to review the proposed DFR action.

In Part II of its opinion, CAAF was concerned with *Ex Post Facto* and Double Jeopardy Clause considerations of the DFR action in its relationship to the adjudged and affirmed sentence of the respondent. CAAF had jurisdiction under the All Writs Act to consider the DFR action, as double jeopardy and *ex post facto* concerns are the type of concerns that warrant interlocutory appeal or extraordinary relief under *Abney, Lynce v. Mathis,* and *Collins v. Youngblood.* The Goldsmith case carried significant implications on presidential authority to undertake a DFR action as applied to respondent. A declaration that CAAF lacks jurisdiction over respondent's DFR challenge would grant license to the United States to violate the *Ex Post Facto* and Double Jeopardy Clauses of the U.S. Constitution, unfettered by judicial review in the very court that reviews courts-martial proceedings. Additionally, its

[3] The All Writs Act extends jurisdiction to review post-appeal illegal conditions of confinement. *Moore v. Akins,* 30 M.J. 249, 253 (C.M.A. 1990).

impact on morale and discipline also was important to justify supervisory authority in the case, just as in *Noyd, Levy, Unger,* and *McPhail.* Finally, respondent's circumstances were urgent. He was terminally afflicted with the HIV virus. He lacked time to litigate elsewhere. Respondent had colorable double jeopardy and *ex post facto* claims to warrant CAAF jurisdiction.

CAAF could have also exercised All Writs Act jurisdiction to protect and to effectuate the adjudged and affirmed findings and sentence. Article 76, UCMJ, 10 U.S.C. § 876, holds that "[o]rders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers", subject to remission or suspension by the service Secretary or the authority of the President. CAAF thus had a statutory interest under Article 76 to insure that the adjudged and affirmed findings and sentence were not contravened by the DFR action, which would have increased the punishment imposed upon respondent, in violation of the *Ex Post Facto* and Double Jeopardy Clauses. Although the court had such All Writs Act jurisdiction under *Montesinos* and *Bullington,* the court did not mention this basis of jurisdiction. Respondent's writ petition did, however. Resp. C.A. Writ Pet. 10. Even though CAAF did not rest its decision on this jurisdictional basis, this Honorable Court can consider this jurisdictional basis in upholding the CAAF decision. *Blum v. Bacon,* 457 U.S. 132, 137 n. 5 (1982).

C. CAAF properly took jurisdiction, as respondent was not required to originally file his DFR claim with the Air Force Court.

Petitioners assert that CAAF lacked jurisdiction because respondent did not perfect an appeal to that court. The assertion is meritless. *FTC v. Dean Foods Co.,* 384 U.S. 597, 603 (1966). Indeed, this Honorable Court has held that a

defendant could use the All Writs Act to seek a writ of *coram nobis* after the defendant's sentence was complete and he was no longer in custody. *United States v. Morgan,* 346 U.S. 502, 511 (1954)(Continuation of litigation after final judgment and exhaustion or waiver of statutory right is permitted through extraordinary writ when circumstances compel such action to achieve justice). The court-martialed officer in *Frischholz* also sought extraordinary relief under the All Writs Act years after his conviction and appeal. *Accord Garrett v. Lowe,* 39 M.J. 293 (C.M.A. 1994)(Writ granted six years after final appeal).

Petitioners assert that respondent first should have sought extraordinary relief from the DFR action at the Air Force Court of Criminal Appeals. CAAF rejected this assertion for two reasons. First, CAAF agreed to original submission of the DFR action. In *Gray v. Mahoney,* 39 M.J. 299, 303 (C.M.A. 1994), CAAF held a petition for extraordinary relief did not have to be filed in a service court of military review as a prerequisite for the consideration of the case. Subsequent to the *Gray v. Mahoney* decision, CAAF clarified their rules by promulgating Court of Appeals for the Armed Forces Rule 4(b), 43 M.J. CLXXVII (November 1995). This rule provides that a petition for extraordinary relief should *ordinarily* be filed with the service court of criminal appeals. Rule 4(b) explicitly permitted initial filing with CAAF for *good cause. See e.g. ABC, Inc. v. Powell,* 47 M.J. 363 (1997). Since CAAF agreed there was good cause to accept the original filing of the DFR action, Pet. App. 9a, respondent was not required to originally file the DFR action with AFCCA.

Second, CAAF said, respondent could "piggyback" his DFR writ petition on his HIV medication writ appeal under the concept of pendent jurisdiction. Pet. App. 9a. Because the court agreed to original submission, this Honorable Court need not decide how supplemental jurisdiction in 28 U.S.C.

§ 1367 applies to military justice practice, if at all. Prior to enactment of § 1367, pendent jurisdiction involved mating state claims with a related federal claim in a civil action. Also, ancillary jurisdiction involved claims brought by other parties than the plaintiff in a civil action. To overrule *Finley v. United States,* 490 U.S. 545 (1989), Congress enacted 28 U.S.C. § 1367 as part of the Judicial Improvements Act of 1990 to create supplemental jurisdiction. D. Siegel, *Practice Commentary,* 28 U.S.C.A. § 1367 note (1993). Simply put, Section 1367 and concepts of pendent jurisdiction do not apply to military appellate courts. Even so, CAAF still had authority to hear respondent's original DFR claim as good cause existed to file the petition with the higher appellate court.

D. Respondent was not required to exhaust administrative remedies before bringing a writ petition to CAAF.

Petitioners incorrectly assert that respondent had to exhaust other remedies before bringing his petition for extraordinary relief. Pet. Br. 19-20.

Respondent had completed his appeals and was terminally afflicted with the HIV virus. He had limited time to live and to litigate. Where litigation at a different tribunal would prove futile, this Honorable Court has declined to invoke the exhaustion doctrine to bar review. *Lynce v. Mathis,* 519 U.S. 433, 436 n. 4 (1997)(though petitioner did not institute *Ex Post Facto* challenge in state court, this Honorable Court reviewed the case on its merits as it deemed exhaustion of state remedies futile). The law is not deaf when an emergency such as respondent's speaks.

It would have been futile to petition the Air Force Board for Correction of Military Records (hereinafter BCMR). First, BCMRs lack the ability to declare a federal statute

unconstitutional. Second, 10 U.S.C. § 1552 prohibits BCMR consideration of records of courts-martial and related administrative records with two inapplicable exceptions. Lastly, as respondent pointed out in his writ petition to CAAF, Congress has expressed considerable concern about the perception that the BCMRs are "unresponsive, bureaucratic extensions of the uniformed services." H. Conf. Rep. No. 450, 104th Cong., 1st Sess. 798 (1996), *reported in 1996 U.S. Code Cong. & Admin. News 324*. In the same law that created the new DFR statute, Congress also ordered the Secretary of Defense to report on his proposals to fix the BCMRs.[4] National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 554, 110 Stat. 320. Thus, CAAF properly agreed to hear the case.

E. CAAF's invocation of jurisdiction under the All Writs Act is properly confined to reviewable issues.

Petitioners and the dissent in *Goldsmith* suggest military courts will use the All Writs Act to rule on security clearances, promotions, and administrative discharges. Pet. for Cert. 12; Pet. App. 19a. The suggestion lacks merit. Precedent already precludes judicial review of the denial of a security clearance. *Department of Navy v. Egan,* 484 U.S. 518 (1988); *Webster v. Doe,* 486 U.S. 592 (1988); *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886 (1961). Military courts do not review personnel decisions, *Wean v. Holder,* 47 M.J. 540 (Army Ct. Crim. App. 1997), or administrative discharges. *In*

[4] Three years later in late 1998, Congress is still trying to fix the BCMRs. The recently enacted Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. 105-261, §§ 541-45, 112 Stat. 2019-2022, mandated sweeping changes to the BCMR. BCMRs lack an attorney. *Glines v. Wade,* 586 F.2d 675, 678 (9th Cir. 1978). Now Congress has mandated that each BCMR have both a full time lawyer and physician. BCMRs may not reduce their staffs, and they must meet designated processing standards over a 10-year period.

Re Clifton, 28 M.J. 614 (A.F.C.M.R. 1989). The military courts do not review summary courts-martial, *Thomas v. United States,* 19 U.S.C.M.A. 639 (1970), or Article 15 nonjudicial punishments, *Whalen v. Stokes,* 19 U.S.C.M.A. 636 (1970). Petitioners suggest *Fletcher v. Covington,* 42 M.J. 215, *dismissed,* 42 M.J. 116 (1995) says otherwise. Pet. for Cert. 10. Petitioners' brief failed to mention that the case was ultimately dismissed. There, court-martial charges were referred against a Chief Petty Officer after his urine tested positive for drugs. The Chief sought discovery of a damaging quality control report on the laboratory that tested his urine. To avoid producing a report that could hurt other cases, the government dismissed the court-martial, and the ship's captain imposed Article 15 punishment for the same offense. Since the Chief was aboard ship, he had no right to demand a court-martial or to discover the report. The issue dealt with dismissing court-martial charges to preclude discovery, not mere review of an Article 15. The Chief withdrew his petition. *Id.* at 116.

In conclusion, AFCCA had actual jurisdiction over respondent's case under Article 66, UCMJ, and CAAF had potential jurisdiction under Article 67, UCMJ, because of the approved sentence respondent received at his general court-martial. When General Griffith initiated a DFR action that would impose punishments akin to those respondent avoided in his court-martial, CAAF had authority under the All Writs Act in its supervisory capacity to protect and effectuate the adjudged and affirmed sentence by precluding additional punishment that violated the *Ex Post Facto* and Double Jeopardy Clauses of the U.S. Constitution. Respondent's plight was an emergency and possible administrative remedies would have been ineffective. CAAF rightfully agreed to exercise its jurisdiction to hear respondent's writ petition.

II. THE PRESIDENT'S EXERCISE OF AUTHORITY UNDER 10 U.S.C. §§ 1161(b)(2) AND 1167 IN THIS CASE WOULD VIOLATE THE DOUBLE JEOPARDY AND *EX POST FACTO* CLAUSES OF THE CONSTITUTION.

The U.S. Constitution prohibits *ex post facto* laws. U.S. Const. Art. I, § 9, cl. 3. As applied here, a statute that violates this clause has three requirements:

(1) A penal statute.

(2) Applied retroactively.

(3) Disadvantaging the offender affected by it by increasing the punishment for the crime.

Lynce v. Mathis, 519 U.S. 433 (1997); *Collins v. Youngblood,* 497 U.S. 37 (1990); *Beazell v. Ohio,* 269 U.S. 167 (1925); *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390 (1798).

The U.S. Constitution prohibits subjecting any person to double jeopardy for the same offense. U.S. Const. Amend. V. As applied here, a violation of this clause has two requirements:

(1) A criminal statute.

(2) Imposing a multiple criminal punishment for the same offense.

Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488 (1997).

In evaluating whether the statute is criminal or civil for purposes of *ex post facto* and double jeopardy analysis, the Court looks at the following factors:

(1) Did the legislative body indicate an intent to establish a civil penalty or a criminal penalty?

(2) If civil, was the statutory scheme so punitive either in purpose or effect that what was clearly intended as a civil remedy transformed into a criminal penalty. In making this

determination, one may consider but not be limited to certain guideposts.[5] *Id.* at 493 (1997), *adopting analysis in United States v. Ward,* 448 U.S. 242, 248-49 (1980) and *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963).

The DFR law at issue violates the *Ex Post Facto* Clause of the Constitution because it involves the retroactive application of a penal statute against respondent, disadvantaging him by increasing the punishment for his crime. Similarly, the DFR law violates the Double Jeopardy Clause of the Constitution, as it is a criminal statute imposing a multiple criminal punishment on respondent for the same offense.

A. The DFR law contained in 10 U.S.C. §§ 1161(b) and 1167 has a retroactive effect against respondent.

Respondent was convicted on March 4, 1994. The Air Force Court of Criminal Appeals affirmed his conviction on November 20, 1995. On February 10, 1996, Congress enacted the DFR provision at issue in this case as part of the National Defense Authorization Act for Fiscal Year 1996,[6] Pub. L. No. 104-106, § 563, 110 Stat. 325. Respondent was

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[5] The *Kennedy-Ward* guideposts include (a) Whether the sanction involves an affirmative disability or restraint; (b) Whether it has historically been regarded as a punishment; (c) Whether it comes into play only on a finding of *scienter;* (d) Whether its operation will promote the traditional aims of punishment of retribution and deterrence; (e) Whether the behavior to which it applies is already a crime; (f) Whether an alternative purpose to which it may rationally be connected is assignable for it; and (g) Whether it appears excessive in relationship to the alternative purpose assigned to it.

[6] However, the amended § 116l(b) originally referred in its text to nonexistent § 1178, not to § 1167. The National Defense Authorization Act for Fiscal Year 1997 corrected the error. Pub. L. No. 104-201, § 1074(a)(5), 110 Stat. 2658. The technical amendment was enacted on September 23, 1996. 110 Stat. 2422.

notified of the DFR action on December 18, 1996. Pet. App. 25a. Thus, the DFR law had retroactive effect on respondent.

B. Congress intended its 1996 DFR provisions to be a penal and criminal penalty. This is revealed by an analysis of the history of DFR actions, the legislative history behind the 1996 change to the DFR law, and the statutory construction of the DFR law.

1. Contrary to Petitioners' assertion (Pet. Br. 28), a DFR action has not been historically remedial. Instead, it has been used to serve a military justice function.

DFR laws began in the 1870s. Both Article for the Government of the Navy 36 and Article of War 118 first permitted a DFR action for an unauthorized absence of at least three months. Congress later expanded DFR actions to cover confinement in a civil facility after a criminal conviction, first for the Army and then for the Navy. Act of Jan. 19, 1911, ch. 22, 36 Stat. 894; Rep. Nos. 209 and 309, 65th Cong., 2d Sess. (1918); Act of Apr. 2, 1918, ch. 39, 40 Stat. 501. These DFR laws survived in this form as a part of the military justice system for decades.

Congress overhauled the military justice system after World War II by enacting the Uniform Code of Military Justice (UCMJ), Pub. L. No. 81-506, 64 Stat. 106. When enacted in 1950, the UCMJ superseded the Articles of War and the Articles for the Government of the Navy. Section 1 of the law covered the 140 original articles of the UCMJ, including the punitive articles and procedural matters. *Id.* at 108-146. The remaining fourteen sections "related to" military justice. S. Rep. 486, 81st Cong., 2d Sess., *reported in* 1950 U.S. Code Cong. & Admin. News 2225. Section 10 adopted the criteria and language of the DFR laws previously found in Article of War 118 and Article for the Government of the Navy 36. Pub. L. No. 81-506, 64 Stat. 152.

The DFR law was subsequently codified in Chapter 22 of 50 U.S. Code §§ 551-741, entitled the "Uniform Code of Military Justice". Section 10 on DFR actions was codified at 50 U.S. Code § 739 in the subchapter XI, covering Miscellaneous Provisions of Chapter 22. Thus, as enacted in 1950, the law allowing DFR for extended unauthorized absences or extended confinement was in the Code chapter for the UCMJ. On January 1, 1957, the UCMJ was enacted into positive law and moved from Title 50 to Title 10 of the U.S. Code, with the DFR law moving to its present location at 10 U.S.C. § 1161(b).

It is inaccurate to claim that the National Defense Authorization Act for Fiscal Year 1996 labeled the DFR procedure as a "personnel" action.[7] The DFR law is codified in Chapter 59 of Title 10, entitled "Separation". 10 U.S.C. §§ 1161-1176. Chapter 59 covers all types of separations, including punitive discharges adjudged by courts-martial for officers in § 1161(a) and for enlisted personnel in § 1169(2). The DFR law is included at 10 U.S.C. § 1161, with its caption reading "Commissioned officers: limitations upon dismissal". "Dismissal" is a term of art. Dismissal of an officer is a punitive discharge; it is the officer equivalent of a dishonorable discharge for enlisted personnel. Rule for Courts-Martial (RCM) 1003(b)(9), Manual for Courts-Martial (MCM), United States, 1984. It is the most severe form of punishment imposable by a court-martial. *See generally Frazier v. McGowan,* 48 M.J. 828, 831 (C.G. Ct. Crim. App. 1998)(even the lesser type of punitive discharge (a bad conduct discharge) is more onerous than confinement). Merely placing a DFR statute within a "separation" chapter does not end the inquiry, as the *ex post facto* effect of a law

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[7] Both the UCMJ and DFR chapters fall within Title 10 U.S.C. Part II – Personnel.

cannot be evaded by disguising a criminal imposition as a civil action. *Burgess v. Salmon,* 97 U.S. 381, 385 (1878).

Petitioners have attempted to characterize the DFR law as a mere "personnel" action. It is not. A DFR action formally ends a commissioned officer's military status and, once accomplished, the officer is ineligible to reenter the Armed Forces. AFI 36-3207, para 4.1.1; *In Re Wilson,* 33 F.2d 214 (E.D.Va. 1929). Section 1161(b) on DFR actions serves a military justice function. As enacted, first in the Articles for the Government of the Navy and the Articles of War and then in the UCMJ, DFR actions were only used for criminal acts: an extended unauthorized absence in violation of Articles 85 (desertion), 86 (absence without leave), or 87 (missing movement), UCMJ, 10 U.S.C. §§ 885-87, or a criminal conviction in state or federal courts. Officers dropped from the rolls for absence without authority forfeit all pay. 37 U.S.C. § 803. Moreover, even prior to 1996, an officer dropped from the rolls left the service in a *dishonorable status.* W. Winthrop, *Military Law and Precedents,* 746 n. 99 (2d ed. 1920)(citing Circ. No. 4 (H.A.) 1891). Thus, a pre-1996 DFR action removed criminal officers who were generally beyond the reach of military control and served a military justice function. Act of Jan. 19, 1911, 36 Stat. 894; Rep. No. 966, 61st Cong., 2d Sess. (1911).

2. The year 1996 brought forth a radical change in the use and purpose of DFR actions when Congress amended 120 years of DFR law. The timing of this statutory change reveals Congress' intent to punish officers like respondent who had already been court-martialed, yet were still within military control and who were receiving pay while in confinement. This intent was divined by the court of appeals when it concluded that §§ 1161 and 1167 were punitive and that, as applied to respondent, they violated both *Ex Post Facto* and Double Jeopardy Clauses. Pet. App. 14a. The court of

appeals noted §§ 1161 and 1167 were "part of a package designed to deal with the same congressional concern that motivated passage of the 'punitive' Article 58b." *Id.* The new DFR law was viewed *in pari materia* with amended Article 57 and new Article 58b. Both were intended to be penal laws. The legislative history confirms this Congressional goal.

Amended Article 57 changed the effective date of that portion of a sentence that forfeited pay or allowances. Previously, forfeitures did not become effective until approved by action of the convening authority, the commander who convened the court-martial. Amended Article 57 made forfeitures effective on the earlier of the date that is l4 days after the date of the adjudged sentence or the date the convening authority takes action on the sentence. New Article 58b imposed total forfeitures of pay and allowances as a matter of law under certain circumstances. CAAF found new Article 58b violated the *Ex Post Facto* Clause when applied retroactively. *United States v. Gorski,* 47 M.J. 370 (1997).

While amending Article 57 and adding Article 58b to accomplish the stated goal of punishing future offenders through the forfeiture punishment provisions, Congress also changed the law to allow the dropping of officers from the rolls after their court-martial convictions were final. This insured that officer prisoners in confinement at the time of the legislation would be subject to identical punishments as those imposed by Article 58b on future offenders. CAAF noted this, stating, "termination of an officer's military status by dropping [him] from the rolls—a termination resulting from punitive action taken pursuant to the UCMJ—would have the same effect of terminating pay that is imposed by Article 58b." Pet. App. 14a.

CAAF made the proper conclusion from legislative history. The mixture of the two UCMJ articles and the new

DFR law began when Senator Barbara Boxer introduced S. 205 to amend Title 37, U.S. Code. § 804 to prohibit paying service members who were confined. Senator Boxer noted the legislation would save money and "treat military criminals as they deserve to be treated—as criminals—to be punished, not rewarded." 141 Cong. Rec. S.802 (Jan. 11, 1995).

The House of Representatives in June, 1995, worked the Boxer bill into its proposed legislation by requiring forfeiture of pay and allowances during any period of military confinement, with the amount forfeited being "the maximum percentage that the court-martial could have directed as part of the sentence." H. R. Rep. No. 131, 104th Cong., 1st Sess. 218 (1995).

The Senate modified the House proposal in July 1995 by having the automatic forfeitures apply to sentences which included confinement for one year or more. It also added a proposal to separate service members in long term military confinement, which it defined as one year or more. The Senate labeled these two proposals "Section 526. Forfeiture of pay and allowances and reduction in grade." and "Section 553. Separation in cases involving extended confinement." S. Rep. No. 112, 104th Cong., 1st Sess. 245-46 (1995). Most significantly, the Senate Report discussed all three provisions—amended Article 57, new Article 58, and the separation legislation—together. After discussing the forfeiture provisions, the Senate Committee on Armed Services noted:

> [I]n general, individuals sentenced to extended confinement are discharged from military service and lose their entitlement to military pay. There are some circumstances under current law, however, in which an individual can remain on active duty and continue to receive pay and allowances. The provisions recommended by the committee would make it clear that persons serving extended confinement should not receive pay or allowances and should not remain on active duty.

Id. at 246. The Senate thus affirmatively linked the three provisions into a common punitive purpose and with identical terms.

A Conference Committee resolved the variance in the House and Senate proposals in January 1996. The House amended the Senate bill by lowering the triggering sentence for automatic forfeitures under Article 58b from one year to six months. H. Conf. Rep. No. 450, 104th Cong., 1st Sess. 853 (1996), *reported in 1996 U.S. Code Cong. & Admin. News 379.* Simultaneously, the House reduced the minimum confinement time for separation from one year to six months, paralleling the provisions of Article 58b and enabling the statute to punish more officers. H. Conf. Rep. No. 450, 104th Cong., 1st Sess. 799-800 (1996), *reported in 1996 U.S. Code Cong. & Admin. News 325.* The Senate concurred in the House proposal to reduce the time periods. H. Conf. Rep. No. 450, 104th Cong., 1st Sess. 800, 853 (1996), *reported in 1996 U.S. Code Cong. & Admin. News 325, 378-79.*

The Conference Committee also proposed procedural legislation on how to implement its recommendation for "Separation in cases involving extended confinement." Specifically, it recommended the two changes to Chapter 59 of Title 10, by adding § 1167 to provide for the discharge of these members and by amending § 1161(b) to allow an officer meeting § 1167 criteria to be summarily dropped from the rolls of the armed forces. *Id.* at 146. One of the criteria for the separation and DFR proposals was that the member must actually have served at least six months in confinement. The Committee's recommendations were adopted verbatim by Congress in the National Defense Authorization Act for Fiscal Year 1996. Pub. L. 104-106, § 563, 110 Stat. 325.

In sum, Congress in 1996 passed Article 58b to punish future offenders by requiring automatic forfeiture of their pay while in confinement, regardless of their adjudged sentence. It simultaneously authorized the summary removal of an officer through a DFR action without the procedural rights afforded in separation actions.[8] Congress thus was able to use the DFR mechanism to punish officers who were outside the reach of Article 58b because they had already been court-martialed.

3. By its own terms, the new DFR law applies to respondent by reason of a sentence to confinement adjudged by a court-martial. The triggering mechanism is a court-martial conviction. A penalty conditioned upon commission of a crime is "significant of penal and prohibitory intent." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 781 (1994). Petitioners assert that administrative aspects of a DFR make it a civil action. Pet. Br. 26. The argument fails. The most common military justice action is the Article 15 nonjudicial punishment (hereinafter NJP). 10 U.S.C. § 815. Each NJP accuses the military offender of violating a UCMJ punitive article and then details a factual specification. Although administrative like a DFR action, NJP is clearly a military justice action. Indeed, the Commander-in-Chief describes an Article 15 as "more serious than an

[8] Chapter 60 of Title 10 already permits discharge for misconduct of an officer who is convicted by a court-martial and not sentenced to dismissal. 10 U.S.C. § 1181(b). Unlike the summary separation imposed by a DFR action, an officer separated under Chapter 60 has significant due process rights. 10 U.S.C. §§ 1182 (evidentiary hearing before a board of inquiry), § 1185 (notification, discovery). The Air Force initiated such an administrative discharge action against respondent in February 1998, but has delayed that action until this case is resolved. Pet. for Cert. 18, n.3. Petitioner seeks to dismiss the due process protections of an administrative discharge proceeding as "cumbersome, time-consuming, and resource-intensive". Pet. for Cert. 19.

administrative corrective measure." Manual for Courts-Martial, United States, 1984, Part V, ¶ 1b. A DFR action is the same. The revised DFR statute is triggered by a criminal act; it removes a military offender who is within military control; and it serves a criminal and penal purpose.

The DFR statute operates through 10 U.S.C. § 1167, which is entitled: "Members under confinement by sentence of court-martial: separation after six months confinement." The caption alone speaks of a penal or criminal purpose. The text of § 1167 details a penal purpose: separation after serving six months confinement if the sentence is final under Chapter 47. Chapter 47 is the Uniform Code of Military Justice, which consists of penal statutes or criminal laws. Section 1167 requires the sentence to be "final." This is a term of art under Article 76, UCMJ, 10 U.S.C. § 876. It basically means all reviewing authorities, including the appellate courts, have reviewed the sentence. Section 1167's repeated association with the UCMJ speaks of a penal purpose for the statute.

C. Assuming *arguendo* the new DFR law is construed as a civil statute, applying the *Kennedy-Ward* guideposts[9] shows the DFR statutory scheme transformed the statute into a criminal penalty, as its scheme is punitive in purpose or effect.

1. The DFR action results in affirmative restraint. Respondent loses his military status and pay but remains in military prison subject to the UCMJ. Loss of status and of pay while in military confinement has historically been a court-martial punishment. The new DFR law has the same effect on respondent—loss of military status and loss of pay and allowances—as the dismissal that the court-martial panel elected not to adjudge at his court-martial.

[9] See footnote 5, *supra*.

2. As drafted, the DFR law for a court-martial relies upon the underlying offenses, all of which required scienter. By relying upon the court-martial conviction, the new DFR statute incorporates the very scienter of respondent's court-martial.

3. The new DFR action promotes the traditional role of retribution and deterrence in the specialized military society. A higher standard of conduct is imposed on an officer by law, and the officer who fails that trust can be held to greater accountability. *United States v. Tedder,* 24 M.J. 176 (C.M.A. 1987); *United States v. Pitasi,* 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971). The DFR action deters respondent and other officers who are HIV positive from violating safe sex orders in the military, a unique military offense. The loss of military status and military pay serves as retribution for these military offenses. The DFR action against respondent promotes the same deterrence and retribution a dismissal would have had on respondent.

4. The DFR law relies on the behavior for which the military offender was convicted. Indeed, the wording of the law involves the same conviction, not just the same behavior. The DFR statute satisfies the "same elements" test in *Blockburger v. United States,* 284 U.S. 299 (1932).

5. There is no rational alternative purpose assignable to the DFR action that seeks to drop respondent from the rolls of the Air Force. Unlike petitioners' claim (Pet. Br. 29), a DFR action is not needed to promote efficiency in the armed forces or to separate a member who is no longer performing military duties. This flawed logic is apparent when one considers that the legislation does not permit the military to institute a DFR action until the officer has *served* at least six months confinement, even if the conviction is already final.

Military efficiency can be promoted by dropping a service member from *unit rolls,* an action affecting manning

strength only without terminating military status. AFI 36-3207, paragraph 4.1.2. Service members who are absent without authority or who are in civilian confinement are no longer under military control. They can be dropped from unit rolls, thus affecting Air Force strength figures without ending a member's military status. However, dropping an officer from the rolls of the Air Force ends a member's military status. Its sole purpose is to impose the same punishment result that a court-martial sentence of dismissal would achieve, even though the offender is within military control.

6. Further, the new DFR statute is excessive in relationship to its purpose. Court-martialed officers sentenced to confinement but no dismissal can be and usually are administratively separated with the due process protections of a board of inquiry under 10 U.S.C. §§ 1181(b), 1182, and 1185. A board of inquiry achieves the same result of separating an officer from active duty, although the board could recommend retention of the officer. Moreover, a recommendation to retain an officer cannot be disregarded by higher authority. AFI 36-3206, paragraph 7.34.5. The DFR action rids the service of an officer offender within military control through summary drumhead justice rather than through the protections of a court-martial or an administrative discharge board. It is overkill without safeguards.

The presence of *Kennedy-Ward* guideposts reveal the statutory scheme was punitive in purpose and effect. Thus, the statute is transformed into a criminal penalty in violation of the Double Jeopardy Clause.

D. The new DFR law disadvantages respondent and increases punishment for his offenses.

1. Respondent changed his status from civilian to military upon being commissioned as an officer. He received base pay and such allowances as basic allowance for

subsistence and basic allowance for quarters. He became subject to the UCMJ and could be convicted by a court-martial for violating the UCMJ. The UCMJ sets mandatory maximum sentences such as death or life in prison for certain offenses. However, the President has authority under Article 56, UCMJ, 10 U.S.C. § 856, to set maximum limits on punishment for most other offenses. Unlike offenders in state or federal systems of criminal justice, a military offender can be sentenced to forfeit his pay, lose status as a service member, and be removed from the military with a stigma. A court-martial can separate an accused only with a punitive discharge, not with an administrative discharge. *United States v. Phipps,* 12 U.S.C.M.A. 14, 30 C.M.R. 14 (1960)(opinion mentions undesirable discharges, which are now called "Under Other Than Honorable Conditions" discharges).

2. Respondent was convicted and sentenced to six years confinement and forfeiture of $2,500 of his base pay each month for 72 months (a total of $180,000). Significantly, the court-martial panel did **not** sentence him to a dismissal. Had the punishment included a dismissal, the Secretary of the Air Force could order execution of the dismissal after his appeals ended. Once executed, a dismissal ends military status, resulting in loss of all pay and allowances. A prisoner losing military status remains in prison subject to court-martial jurisdiction under Article 2(a)(7), UCMJ, 10 U.S.C. § 802(a)(7). The practical effect of his sentence was that respondent remained on active duty drawing a portion of his base pay and his allowances. Upon retirement, he also might have received benefits from the Veterans Affairs Department, including VA medical care for his HIV infection that was incurred incident to active duty. Knowing such effects, the court-martial panel (jury) did not impose a dismissal, choosing instead to impose 6 years confinement (out of a maximum of 10 years) and forfeiture of $2,500 pay per month

for 72 months. The Air Force cannot now disregard the judgment of the panel's calculation of an appropriate sentence, which affirmatively avoided the deleterious effects of a dismissal upon the respondent. *See Lynce v. Mathis,* 519 U.S. 433, 445-446 (1997)(citing *Weaver v. Graham,* 450 U.S. 24, 32 (1981)).

3. The proposed DFR action would increase respondent's punishment. His pay situation would go from forfeiture of part of his pay to loss of **all** pay and allowances. He would go from active duty status to civilian status while still subject to court-martial jurisdiction for the remainder of his confinement. He also would suffer the stigma of separation with ignominy inherent with being dropped from the rolls. The DFR action would also cost him VA medical care, which was needed to treat his HIV infection should he leave military service, in addition to numerous other federal, state, and local benefits.

4. Petitioner notes that Congress can impose civil and criminal sanctions for the same conduct. Pet. Br. 30. While this is true, respondent's situation differs from the cases cited by petitioners. *United States v. Ursery,* 518 U.S. 267 (1996) involved *in rem* civil forfeitures. Such forfeitures are not involved in respondent's case. His situation also is easily distinguishable from *Hudson v. United States,* 522 U.S. 93 (1997) and occupational debarment cases.

Criminal courts in *Hudson* and cases involving debarment in occupations, such as a doctor or a lawyer, do not impose an occupation debarment as part of the criminal sentence. Criminal courts also do not take away the offender's government pay as part of the criminal sentence. Another proceeding can impose those sanctions. In contrast with civilian criminal courts, however, a general court-martial can sentence an officer offender to loss of military status and forfeiture of all or part of military pay. In respondent's case,

the DFR action imposes the loss of active duty status and forfeiture of total pay that respondent avoided as a permissible punishment in his case. Forfeiture of military pay is not equivalent to the monetary sanction imposed in *Hudson.* Under RCM 1003(b)(2) & (3), a general court-martial may impose either a forfeiture of pay or a fine, or both, as a criminal punishment. Forfeiture involves military pay the service member gets each month. Fine involves monies from the offender's own pocket. The monetary sanction in *Hudson* is equivalent to a military fine. The DFR action is not imposing a different sanction; it is imposing the very financial punishment respondent avoided as his sentence.

5. DFR action based on a court-martial conviction smacks of a violation of RCM 1107(d)(1), which prohibits a convening or higher authority from increasing the punishment imposed by a court-martial. If upset that the sentence lacks a punitive discharge, the convening or higher authority can nullify the verdict by initiating a DFR action despite the judgment of the court-martial panel. The senior official can use the DFR statute to get the same result as the court-martial, add a stigma to the separation like a punitive discharge, and increase the punishment. This is similar to the type of abuse feared in *Unger,* 27 M.J. at 354 and nn. 10-11, 355. There, Chief Judge Everett expressed concern about bypassing the protections of a court-martial where no punitive discharge was either adjudged or approved. Similar concerns were voiced 39 years earlier in *Phipps,* 12 U.S.C.M.A. at 16, 30 C.M.R. at 15-16 (Quinn, C.J., concurring). Even three of the members of CAAF who found jurisdiction under the All Writs Act to consider *Goldsmith* found the DFR action increased respondent's punishment.

6. Petitioners assert no stigma attaches to a DFR action. In reality, a DFR action is a badge of dishonor and is a punishment. The Executive Branch, acting through the

Veterans Affairs Department, promulgated a VA regulation concerning benefits related to separations. 38 C.F.R. § 3.12(d) precludes VA benefits when the separation is based on "one of the offenses specified in this paragraph is considered to have been issued under *dishonorable* conditions: ... (3) An offense involving moral turpitude. This includes, generally, conviction of a felony." A DFR action based upon a court-martial for offenses involving moral turpitude is certainly a separation under dishonorable conditions.

Petitioners assert *Helmich v. Nibert,* 543 F. Supp. 725 (D. Md. 1982) proves that no stigma attaches to a DFR action. Pet. Br. 33. *Helmich,* which involved a *pro se* litigant without legal knowledge, relied on an Army regulation covering separation actions. However, the *Helmich* court failed to consider the impact of the VA regulation. The court there acknowledged that a liberty interest within the Fifth Amendment's Due Process Clause would be at hand when the military separated a member under conditions that stigmatize that member, "typically by *dishonorable* discharge." *Helmich* at 727 (emphasis added). The VA regulation provides the dishonorable stigma to the DFR action. The DFR action costs respondent more than just his active duty status. It also stigmatizes him with a loss of his status as a commissioned officer.

To say that a DFR action carries no stigma belies common sense and fails to account for the tremendous importance placed upon an honorable service characterization for those serving in our nation's armed forces. The profound impact wrought by a less than honorable service discharge is most often seen in the realm of administrative discharges. Since the vast majority of military members receive honorable discharges, any service characterization not fully honorable brands the member with wide-ranging deleterious effects. See

Everett, *Military Administrative Discharges—The Pendulum Swings,* 1966 Duke L.J. 41 (1966).

Recognizing that less than honorable discharges had nearly as severe an impact on a member's life, Congress became increasingly concerned in the early 1960s with the concerted effort of the Armed Forces to bypass the constitutional protections embodied within the UCMJ by discharging members from the service via administrative discharges vice courts-martial proceedings. *Id.* at 49, 53. Though some reforms were made, the judicial branch of the federal government repeatedly recognized the stigma associated with such discharges. See *Kauffman v. Secretary of the Air Force,* 415 F.2d 991, 995 (D.C. Cir. 1969); *Van Bourg v. Nitze,* 388 F.2d 557, 559 n.1 (D.C. Cir. 1967); *Bland v. Connally,* 293 F.2d 852, 853 n.1 (D.C. Cir. 1961).

Prospective employers often refuse to hire members with less than honorable discharges.[10] A review of federal, state, and local benefit programs reveals the life-long burden placed on members with less than honorable discharges. For example, Department of Veterans Affairs benefits are given only to service members who meet the definition of "veteran": namely, "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 101(2).[11] The Armed Forces likewise condition benefits

[10] Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation,* 59 Mil. L.R. 1, 18 (1973) (study revealed significant use of the discharge certificate to qualify for employment and benefits.)

[11] VA benefits include dependency and indemnity, Servicemembers' Group Life Insurance, educational assistance, home and other loans, and funeral and burial expenses. *Id.* at 11.

upon service characterization.[12] Also, numerous federal agencies follow suit, as a service member's reemployment rights and veterans federal civil service preferences are adversely affected. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation,* 59 Mil. L.R. 1, 12 (1973). State agencies have similar restrictions, as they typically condition benefits upon receipt of an honorable discharge.[13]

While the widespread stigma associated with a less than honorable discharge is commonly recognized, the negative import of a DFR action is largely overlooked. Petitioners assert that a DFR action carries no stigma because no service characterization is issued by the military. Pet. Br. 32. Though it is true that a member who is dropped from the rolls is not given a service characterization, it is certainly not true that the failure to provide a discharge certificate (Department of Defense Form 214, hereinafter DD Form 214) produces no stigma. Such a failure to issue a DD Form 214 causes profound and pernicious effects to the military member and his or her dependents. The data contained on the DD Form 214 not only summarizes the member's service record, it is also used extensively by federal and state agencies, prospective employers, and professional licensing boards.[14] If the respondent is dropped from the rolls of the Air Force, he will not receive a DD Form 214. AFI 36-3202, Table 2, Rule 8 (20 May 1994). Thus, his entire period of military service

[12] Benefits include payment for accrued leave (37 U.S.C. § 501), transportation of dependents and household goods, and burial in a national cemetery. *Id.* at 12.

[13] E.g. Tex. Gov't Code § 657.002 (1998)(must be honorably discharged to qualify for veteran's employment preference).

[14] General Accounting Office, *Need For and Uses of Data Recorded on DD Form 214 Report of Separation Form Active Duty* (Jan. 23, 1975) (FPCD-75-126).

as an officer, stemming back almost 20 years, will simply evaporate. Prospective employers typically refuse to hire a service member unless they produce a DD Form 214.[15] The lack of a DD Form 214 would also hamper respondent's ability to convert his Servicemembers' Group Life Insurance policy to a commercial policy as insurance companies typically examine the DD Form 214 to verify that the conversion occurs within 120 days of release from active duty.[16] In addition to the hindrances caused by a lack of a DD Form 214, a DFR'd member will not receive payment for accrued leave, akin to those discharged under less than honorable conditions. 1990 U.S. Comp. Gen. 668 (1990). The importance of receiving a DD Form 214 is vividly demonstrated by its wide-spread uses in civilian life. In sum, a DFR action will stigmatize the service member in a manner akin to a dismissal adjudged by a court-martial, though the service member does not receive any service characterization.

Not only does the DFR statute disadvantage the officer by stigmatizing the member, it also imposes a change in status from service member to civilian for a specific court-martial sentence. In *Trop v. Dulles,* 356 U.S. 86 (1958)(plurality), this Honorable Court struck down a law that changed a service member's status from citizen to expatriate for a specific court-martial sentence. In 1940, Congress amended this Civil War-era law to cause a soldier to lose his citizenship for a

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[15] Jones, *supra,* note 10 at 16. More than 50% of prospective employers required veterans to produce the DD Form 214 as a part of the employment application process. Many employers would disqualify a veteran from further consideration if the form was not produced. Further, the veteran faces stigmatizing consequences not commonly incurred by civilian employment applicants since the DD Form 214 releases far more information than civilian employers would provide about their former employees. *Id.* at 17.

[16] *Id.* at 19.

court-martial conviction for wartime desertion. In 1944, Congress again amended the statute to limit the change in status from citizen to expatriate to a wartime deserter whose court-martial sentenced him to dismissal or a dishonorable discharge. After passage of that law, Trop deserted his unit in North Africa, and a court-martial sentenced Trop to three years confinement, total forfeitures, and a dishonorable discharge. His 1952 application for a passport was denied because he had lost his citizenship under the 1944 law. In 1955, Trop sought declaratory judgment that he was a United States citizen.

Using the *Calder v. Bull* analysis, a plurality of this Honorable Court concluded that this statute changing the citizenship status of a soldier sentenced by a court-martial to a dishonorable discharge for wartime desertion was a penal statute. The Court rejected Government claims that the statute "technically is not a penal law." *Trop* at 94. This Honorable Court held that the fundamental nature of the statute was penal.

The DFR action disadvantages respondent and increases respondent's sentence by taking action akin to the dismissal avoided at trial and by causing the total forfeiture of his pay and allowances. Additionally, the DFR action stigmatizes respondent with life-long deleterious effects. The court-martial panel (jury) decided against inflicting such punishments despite the opportunity to do so, choosing instead to sentence respondent to 6 years confinement and forfeiture of $2,500 pay for 72 months. The Air Force cannot now render this judgment infirm.

E. The Air Force lacks the regulatory authority to DFR respondent.

The Air Force does not possess the regulatory authority to apply the DFR action to respondent. 10 U.S.C. § 1161

permits DFR actions in cases of officers who may be separated under Section 1167. Section 1167 authorizes the separation of members sentenced by a court-martial to certain sentences "[e]xcept as otherwise provided in regulations prescribed by the Secretary of Defense". The letter initiating DFR action against respondent cited Section 563 of the National Defense Authorization Act for Fiscal Year 1996 and AFI 36-3207, paragraph 4.2.3. as authority for the Air Force's action. Pet. App. 25a. However, at the time of the DFR initiation in November 1996 (and through the writing of this brief), the Air Force instruction only permitted DFR actions for officers convicted by civil authorities and confined in federal or state facilities, not officers in confinement under a sentence of a court-martial. AFI 36-3207, 4.3.1. By failing to include a DFR action for an officer convicted by a court-martial in its instruction, the Air Force, as a matter of policy has promulgated a more protective regulation, as permitted by § 1167. Thus, the Air Force initiated this action without having any implementing Departmental instructions.

Further, § 1161(b) permits only the President to DFR an officer. Congress permits a President to delegate a statutory duty, 3 U.S.C. § 301, but no President has issued an executive order to delegate DFR actions. II U.S.C.A. Table 3 Executive Orders (1998). (Presidential delegation authority under Article 140, UCMJ, 10 U.S.C. § 940, only applies to Chapter 47 of Title 10). AFI 36-3207, paragraph 4.2. purports to let the Secretary of the Air Force drop officers from the rolls.

Not only is a regulatory basis lacking, the proposed DFR action conflicts with Article 56, UCMJ, 10 U.S.C. § 856. Article 56 lets the President prescribe the sentence courts-martial may impose. Under that authority and RCM 1003(b), the President set the maximum punishment for respondent's offenses at 10 years confinement, dismissal from the service, up to total forfeiture of pay and allowances and a fine. The

court-martial panel chose not to adjudge a dismissal and it set forfeitures at $2,500 pay/month for 72 months. The DFR action now has the President taking an action that, in this case, converts this partial forfeiture of base pay to total forfeiture of pay and allowances and retention of military status to a separation with ignominy.

In sum, Respondent's court-martial could have sentenced him to a loss of military status via a dismissal. It did not. The new DFR statute exacts the same loss of military status under a different name. By increasing respondent's punishment as a direct incident of his court-martial conviction, the new DFR law disadvantaged respondent by increasing his punishment. The DFR law at issue violates the *Ex Post Facto* Clause of the Constitution because it involves the retroactive application of a penal statute against respondent, disadvantaging him by increasing the punishment for his crime. Similarly, the DFR law violates the Double Jeopardy Clause of the Constitution, as it is a criminal statute imposing a multiple criminal punishment on respondent for the same offense. Finally, the Air Force lacks the regulatory authority to DFR respondent.

The opinion and order of the Court of Appeals for the Armed Forces must stand. The court of appeals properly exercised its jurisdiction under the All Writs Act to prohibit the application of statutes that violated the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution of the United States.

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces should be affirmed.

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OCTOBER TERM, 1998

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

JAMES T. GOLDSMITH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-347

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

JAMES T. GOLDSMITH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONERS

A. The All Writs Act Does Not Provide Jurisdiction For The Court Of Appeals' Order In This Case

The All Writs Act, 28 U.S.C. 1651(a), provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Contrary to respondent's contention, that Act provides no basis for the action of the Court of Appeals for the Armed Forces (CAAF) in this case. See Gov't Br. 15-16. The action to drop respondent from the rolls fell well outside the CAAF's jurisdiction, and alternative avenues of relief authorized by statute were open to respondent. Accordingly, the CAAF did not act "in aid of [its] jurisdiction" when it enjoined petitioner from dropping respondent from the rolls

and its action was neither "necessary" nor "appropriate * * * and agreeable to the usages and principles of law."

1. *Potential jurisdiction.* Respondent seeks to justify (Br. 12) the CAAF's exercise of authority under the All Writs Act in this case by pointing to its "supervisory power over the administration of military justice for cases within its potential jurisdiction." This case, however, was not within the CAAF's "potential jurisdiction," and the CAAF was not exercising its "supervisory power."

a. At most, a case remains within the CAAF's "potential jurisdiction" for so long as the findings and sentence could become the subject of direct review by the CAAF. See 10 U.S.C. 866, 867. But the approved findings and sentence in respondent's case had become final more than one year before the Air Force initiated this action to drop respondent from the rolls. The opportunity to seek discretionary review in the CAAF had, therefore, long expired. The court-martial sentence was thus not within the CAAF's potential jurisdiction when respondent presented his current claim to the CAAF.[1]

In addition, respondent's claims are not within the CAAF's jurisdiction—actual or potential—because they do not challenge the findings or sentence of the court-martial. See 10 U.S.C. 866, 867. Respondent does not allege any error in the court-martial findings or sentence. Instead, respondent claims that the government could not drop him from the rolls pursuant to 10 U.S.C. 1161(b)(2) (Supp. II 1996). As we explained in our opening brief (at 17-18), that provision sets forth an administrative separation procedure that is not—and could not be—part of the court-martial

[1] Respondent's assertion (Br. 8) that "[m]ilitary courts lack interlocutory appeal procedures for an accused to resolve a colorable claim of double jeopardy and *ex post facto* violations" is of no significance to this case. Because this case does not involve an interlocutory appeal, it does not present the question whether the CAAF could use authority under the All Writs Act to substitute for an interlocutory appeal in an appropriate case.

sentence. See R.C.M. 1003(b)(9) ("A court-martial may not adjudge an administrative separation from the service."). Accordingly, respondent's claim that he should not be dropped from the rolls is not a claim within the CAAF's statutory jurisdiction.

b. Respondent is mistaken in claiming (Br. 11-13) that the CAAF's jurisdiction can be supported as an exercise of "supervisory authority" in this case. Initially, "supervisory authority" is not a basis for jurisdiction, but instead is a basis for a superior court to announce rules governing inferior courts, in the course of deciding cases that are within the superior court's jurisdiction. As this Court has explained, a court's "supervisory authority" permits the superior court in some circumstances to "formulate procedural rules not specifically required by the Constitution or the Congress * * * to implement a remedy for violation of recognized rights, * * * to preserve judicial integrity * * *, and * * * to deter illegal conduct." *United States* v. *Hasting*, 461 U.S. 499, 505 (1983).

In addition, not only does "supervisory authority" fail to provide an independent source of jurisdiction, a court does not have general "supervisory authority" over non-judicial proceedings or actors. See *United States* v. *Williams*, 504 U.S. 36, 47 (1992) ("Because the grand jury is an institution separate from the courts," no general "'supervisory' judicial authority exists" to set standards of prosecutorial conduct before the grand jury). The action to drop respondent from the rolls was not a judicial proceeding. Nor did respondent claim in his challenge to that action that there had been anything amiss in the proceedings or results in his court-martial or in any court that had reviewed his court-martial. Accordingly, the CAAF had no basis for exercising any "supervisory authority" that it may have over inferior military tribunals.

2. *Protecting the adjudged findings and sentence.* Although the CAAF did not rely on this ground, respondent

claims (Br. 13) that the CAAF "could also have exercised All Writs Act jurisdiction to protect and to effectuate the adjudged and affirmed findings and sentence." Extraordinary writs may be issued to compel lower courts to adhere to an appellate court's judgment, see *United States* v. *United States District Court*, 334 U.S. 258, 263-264 (1948), but the extraordinary writ issued by the CAAF did not "protect" or "effectuate" the "affirmed findings and sentence." The "findings and sentence" in the court-martial authorized the government to impose—and the defendant to undergo—the specified punishment for his offense. That punishment was imposed, the findings and sentence were affirmed on appeal and considered final for more than a year, and, indeed, respondent had been released from custody before the CAAF's judgment in this case issued in April 1998. See Pet. App. 3a, 8a. There was therefore nothing left in the findings and sentence to "protect" or "effectuate."

It is true that the findings and sentence of the court-martial, like the judgments in many other cases, had double jeopardy consequences that could bar a successive prosecution or punishment. From the origin of double jeopardy principles in the common law pleas of *autrefois acquit* and *autrefois convict*, see *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978); *United States* v. *Scott*, 437 U.S. 82, 96 (1978), however, the means to raise that bar has always been understood to be by plea in the subsequent proceedings that are alleged to impose double jeopardy. "It was only when the defendant was indicted for a second time after either a conviction or an acquittal that he could seek the protection of the common-law pleas." *United States* v. *Wilson*, 420 U.S. 332, 342 (1975). This Court has never held that a defendant could forgo a double jeopardy claim in defense of a second action and instead seek an injunction against other proceedings from the court that issued the original criminal judgment.

Respondent's theory would turn ordinary practice upside down, as this Court's recent double jeopardy cases illustrate.

For example, in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), the convicted felon did not return to the court that had issued the criminal judgment to seek an injunction on double jeopardy and ex post facto grounds against later civil commitment proceedings; instead, following accepted practice, he pleaded the prior judgment as a bar (though an ultimately unsuccessful one) to the civil commitment proceedings. Similarly, the defendants in *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767 (1994), did not seek an injunction from the court that rendered the criminal judgment seeking to bar the State from imposing a tax based on the same offenses; instead, they raised the Double Jeopardy Clause as a bar to the State's claim in a subsequent bankruptcy proceeding. See *id.* at 773. In *United States* v. *Ursery*, 518 U.S. 267 (1996), the defendants did not attempt to vindicate their double jeopardy claims by returning to the courts in their earlier cases to seek to obtain injunctions against, respectively, the later criminal proceedings and the later civil forfeiture proceedings; instead, they challenged the new actions sought to be taken against them by pleading the earlier judgments in bar in their later proceedings. All of this Court's other recent double jeopardy cases have come to this Court through the same procedural route. See, *e.g.*, *Hudson* v. *United States*, 522 U.S. 93 (1997); *Witte* v. *United States*, 515 U.S. 389 (1995); *United States* v. *Dixon*, 509 U.S. 688 (1993); *United States* v. *Felix*, 503 U.S. 378 (1992); *Dowling* v. *United States*, 493 U.S. 342 (1990); *United States* v. *Halper*, 490 U.S. 435 (1989). There is no authority for respondent's novel theory that the All Writs Act gives a court that has once issued a criminal judgment permanent jurisdiction to enjoin the government—or, as in this case, government officials who were not even parties to the criminal case—from taking future actions against the defendant that could violate the Double Jeopardy Clause.[2]

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[2] None of the cases on which respondent relies (Br. 11) would support

3. *Necessary and appropriate.* Respondent argues (Br. 15-16) that it was "necessary and appropriate" for the CAAF to exercise jurisdiction under the All Writs Act in this case, because the alternative means of making his claims were in his view "futile." In particular, he argues (Br. 15-16) that he did not have to bring his challenge to the action to drop him from the rolls before the Air Force Board for Correction of Military Records (BCMR), because, in his view, the BCMR "lack[s] the ability to declare a federal statute unconstitutional."[3]

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such a claim. In *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172-175 (1977), this Court upheld the district court's authority under the All Writs Act to order a third party to assist the government in installing a pen register authorized by the court under Federal Rule of Criminal Procedure 41. The critical difference between *New York Telephone* and this case is that in *New York Telephone*, the court issued the order in the course of adjudicating an application for a pen register order that was manifestly within its jurisdiction. See 434 U.S. at 172 ("The assistance of the [New York Telephone] Company was required here to implement a pen register order which we have held the District Court was empowered to issue by Rule 41."). In *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942), the Court upheld the lower court's authority to issue a writ of habeas corpus in a federal criminal case "as an incident to the appeal [from a bail order] then pending before it;" the Court did not endorse incidental All Writs Act authority to review actions of executive officials implementing a civil statutory scheme. Nor is respondent assisted by the military cases he cites. Even assuming their correctness, each involved only the court's power to enforce prior judgments, *United States* v. *Montesinos*, 28 M.J. 38 (C.M.A. 1989); *United States* v. *Bullington*, 13 M.J. 184 (C.M.A. 1982), or review post-trial rulings, *United States* v. *Mahoney*, 36 M.J. 679, 684-685 (A.F.C.M.R. 1992), in inferior military tribunals in courts-martial cases.

[3] Respondent states (Br. 16) that "Congress has expressed considerable concern about the perception that the BCMRs are 'unresponsive, bureaucratic extensions of the uniformed services.'" In support of that statement respondent cites (Br. 16 & n.4) criticism of BCMRs in a congressional report and a subsequent statute modifying how BCMRs operate. Neither the criticism nor subsequent statute, however, alter the

Respondent's claim of futility is mistaken. The BCMR has authority generally "to correct an error or remove an injustice" in a military record. 10 U.S.C. 1552(a)(1); see also 10 U.S.C. 1553(a) (special board to review "discharge or dismissal" other than in a court-martial sentence). Although the BCMR may not have authority to "declare a federal statute unconstitutional," Resp. Br. 15-16, it would appear to have power, contrary to respondent's assertion, to correct a record that is erroneous as a result of a constitutional violation.[4] At the very least, any uncertainty on this point should be resolved against respondent, who bypassed the BCMR and therefore precluded a definitive resolution of

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fact that the BCMRs have at all relevant times been the congressionally authorized body to provide the relief sought by respondent.

[4] Although the Air Force regulations are silent on the issue, the regulations and case law regarding the Army and Navy BCMRs, which operate under the same basic statutory authorization as does the Air Force BCMR, confirm this conclusion. See 32 C.F.R. 581.3(c)(5)(v) (Army BCMR's order denying relief "shall include * * * the applicant's claims of *constitutional*, statutory and/or regulatory violations [that were] rejected") (emphasis added); 32 C.F.R. 723.3(e)(4) (same for Navy); see also *Guerra* v. *Scruggs*, 942 F.2d 270, 273 (4th Cir. 1991) ("The [Army BCMR] has authority to consider claims of constitutional, statutory, and regulatory violations."); *Bois* v. *Marsh*, 801 F.2d 462, 467 (D.C. Cir. 1986) ("Bois's claims based on Constitution, executive orders and Army regulations 'could readily have been made within the framework of this intramilitary procedure.'") (quoting *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983)); cf. *Duffy* v. *United States*, 966 F.2d 307, 311 (7th Cir. 1992) ("The mere presence of constitutional claims, however, does not obviate the need to pursue administrative remedies [before an Air Force BCMR]."). In *Brown* v. *Glines*, 444 U.S. 348, 352 n.6 (1980), this Court noted that the court of appeals had decided in that case that a party challenging an Air Force regulation regarding the circulation of petitions on First Amendment grounds did not have to bring his claim before the BCMR before filing an action in federal court. This Court did not itself reach the question whether exhaustion was required in that context.

whether the BCMR would have asserted authority to grant relief on his constitutional claims.[5]

In any event, whether or not it would have been futile for respondent to bring his claims to the BCMR, federal district court review would certainly have been available. See Gov't Br. 19-20. Respondent does not claim—and could not plausibly have claimed—that the federal courts would have been limited in their ability to adjudicate respondent's constitutional claims in the course of reviewing the administrative decision to drop him from the rolls.

4. *Ex post facto claim.* The error in the jurisdictional analyses offered by respondent and the CAAF is perhaps most apparent from a consideration of respondent's ex post facto claim. That claim is even more remote from the court-martial conviction—and therefore from the CAAF's jurisdiction—than his double jeopardy claim. If dropping respondent from the rolls would violate the Ex Post Facto Clause, it would do so regardless of the outcome of his court-martial—indeed, regardless of whether he had ever been subject to a court-martial. Because the CAAF's statutory jurisdic-

[5] Respondent incorrectly states (Br. 16) that 10 U.S.C. 1552 "prohibits BCMR consideration of records of courts-martial and related administrative records with two inapplicable exceptions." Section 1552's bar is much narrower than that posited by respondent. The two relevant subsections are Section 1552(a)(1) and Section 1552(f). Section 1552(a)(1) provides generally that "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice" and that "such corrections shall be made by the Secretary acting through boards of civilians [BCMRs]." Section 1552(f) provides that "[w]ith respect to records of courts-martial * * *, action under subsection (a) may extend only to" cases not at issue here. Section 1552(a) and (f) thus make clear that, unless explicitely authorized, a BCMR may not correct a court-martial record. Neither subsection, however, can be read to prohibit "consideration" of a court-martial record or "related administrative records" by a BCMR, especially where, as here, the court-martial record is relevant in determining the validity of a later personnel action.

tion is limited to "review[ing] the record" in court-martial proceedings, 10 U.S.C. 867(a), the court's jurisdictional basis for reviewing respondent's ex post facto claim is particularly puzzling.

The answer to the puzzle may lie in the CAAF's frank statement that it appropriately asserted jurisdiction because "Congress intended for [the CAAF] to have broad responsibility with respect to administration of military justice." Pet. App. 5a; see also *McPhail* v. *United States*, 1 M.J. 457, 459-462 (C.M.A. 1976); Resp. Br. 9 ("Congress granted broad discretion to the CAAF to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces."). The best indication of Congress's intent, however, is found in the language and structure of the statutes governing the CAAF's jurisdiction. Those statutes provide that the CAAF has jurisdiction only to "review the record in [specified] cases reviewed by" the service Courts of Criminal Appeals, 10 U.S.C. 867(a)(2), which in turn have jurisdiction over appeals from courts-martial "in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." 10 U.S.C. 866(b)(1). The CAAF simply has no "broad responsibility with respect to the administration of military justice" outside the jurisdiction described in these statutes; other administrative bodies and courts (like the BCMR and courts reviewing BCMR decisions) have authority with respect to administrative and judicial review of other military practices. The CAAF erred in concluding that its precisely drawn jurisdictional statutes could be read as a roving commission to root out perceived injustices visited on members of the military—especially in cases like this, in which alternative (and more appropriate) remedies provided by Congress were readily available.

B. An Action To Drop An Officer From The Rolls Is Not Criminal Punishment

On the merits, we explained in our opening brief (at 24-27) that Congress intended the action to drop an officer from the rolls to be a civil, administrative proceeding that separates from the military an officer whose criminal misconduct renders him unfit to serve. We also explained (Gov't Br. 28-34) that, under *Hudson* v. *United States*, 522 U.S. at 93, an action to drop an officer from the rolls is not so punitive in purpose or effect as to negate Congress's intent that it be a remedial, not a penal, measure. Respondent offers no reason to alter those conclusions.

1. Respondent errs in claiming (Br. 20-21) that Congress has always viewed an action to drop from the rolls as a penal, rather than a remedial, measure. The action to drop from the rolls originated as Section 17 of an Army appropriations bill that was enacted on July 15, 1870. Ch. 294, 16 Stat. 319.[6] That Section provided:

> That the President of the United States be, and he is hereby, authorized to drop from the rolls of the army for desertion any officer who is now, or who may hereafter be, absent from duty three months without leave; and any officer so dropped shall forfeit all pay and allowances due or to become due, and shall not be eligible for reappointment.

16 Stat. 319. The inclusion of the provision in an appropriations bill suggests that Congress viewed the action, as we have explained, see Gov't Br. 28, as one "for the purpose

[6] We trace in text the history of the action to drop an officer from the Army's rolls. The action to drop an officer from the naval rolls began with the Act of April 2, 1918, ch. 39, 40 Stat. 501, which was virtually identical to the 1911 statute governing the Army and discussed in text. The provision for dropping from the rolls was incorporated in the Articles for the Government of the Navy when they were included in the first edition of the United States Code, 34 U.S.C. 1200, Art. 36 (1925).

of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered." W. Winthrop, *Military Law and Precedents* 746 (2d ed. 1920). The question whether this remedial step should be taken was fundamentally distinct from the question before a court-martial as to whether dismissal should be imposed as a punishment for the same absence without leave.

Shortly after its enactment, the provision for dropping from the rolls was codified at Revised Statutes § 1229 (1875 ed.) in the section of the "Organization" chapter for the Army entitled "General Provisions of Organization." Significantly, the Revisers did not include it among the penal provisions of the Articles of War, which were codified in a separate chapter under Revised Statutes § 1342 (1875 ed.).

In 1911, Congress expanded the grounds for dropping from the rolls to include not only officers absent without leave for three months, but also officers who had been imprisoned for more than three months pursuant to a conviction by a civilian court. The one-paragraph statute provided:

> That the President be, and he is hereby, authorized to drop from the rolls of the army any officer who is absent from duty three months without leave, or who has been absent in confinement in a prison or penitentiary for more than three months after final conviction by a civil court of competent jurisdiction; and no officer so dropped shall be eligible for reappointment.

Act of Jan. 19, 1911, ch. 22, 36 Stat. 894. Nothing in Congress's action in 1911 suggests that it viewed the provision as anything but a logical expansion of the remedial measure it had adopted in 1870.

The 1911 statute was included in the Articles of War for the first time when Congress revised the Articles in 1916. Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650. It is instructive that the provision for dropping from the rolls—Article

118—was not included among the penal provisions of the Articles, but was instead placed under a separate subheading entitled "Miscellaneous Provisions." See § 3, 39 Stat. 669. That subheading dealt with matters such as the oath of enlistment (Art. 109), the disposition of effects of deceased soldiers (Art. 112), the removal of state civil and criminal suits against military personnel to federal district court (Art. 117), and the rank and precedence as between officers in the regular army, militia, and volunteers (Art. 119). The inclusion of Article 118 in that subheading suggests that Congress did not view it as a penal measure.[7]

In 1950, Congress enacted Public Law No. 81-506, Section 1 of which enacted the Uniform Code of Military Justice (UCMJ) to replace the Articles of War and the Articles for the Government of the Navy. See Act of May 5, 1950, ch. 169, § 1, 64 Stat. 108 ("the articles *in this section* may be cited as 'Uniform Code of Military Justice'") (emphasis added). The action to drop from the rolls was enacted in Section 10 of the same statute, see 64 Stat. 146, and it thus never became part of the UCMJ.[8] Those responsible for

[7] Indeed, far from treating an action to drop from the rolls as a punitive measure, Article 118 distinguished such actions from punitive dismissals. Article 118 provided:

> No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

§ 3, 39 Stat. 669.

[8] See also S. Rep. No. 486, 81st Cong., 1st Sess. 34 (1949) ("Some provisions of these remaining sections have heretofore been included in either the Articles of War or the Articles for the Government of the Navy. It is considered desirable to preserve these provisions in the statutory law; however, *they are not considered to be germane to the provisions of a uniform code of justice*. By separating them from section 1, which includes all of the provisions for the Uniform Code of Justice, they will automatically be excluded from the code but preserved as statutory law in an appropriate place in the United States Code.") (emphasis added).

codification initially codified the provision at 50 U.S.C. 739 (1952), which was in the chapter of Title 50 of the U.S. Code that included the UCMJ; as the codifiers noted, however, Section 739 "was not enacted as a part of the Uniform Code of Military Justice which comprises this chapter." 50 U.S.C. 739 (1952).

When Congress revised and enacted Title 10 of the U.S. Code into positive law in 1956, ch. 1041, 70A Stat. 1, the provision for dropping from the rolls was moved to its present location at 10 U.S.C. 1161(b), see 70A Stat. 89, in a chapter entitled "Separation." Once again, Congress determined not to include it in the earlier chapter entitled "Uniform Code of Military Justice," see 70A Stat. 36-78 (codifying 10 U.S.C. 801-940), thereby keeping it separate from the penal provisions in Title 10.

Respondent argues (Br. 21) that, because Congress entitled Section 1161 "Commissioned officers: limitations on dismissal," and because the term "dismissal" in his view necessarily refers to a penal sanction, Congress viewed dropping from the rolls as a penal measure.[9] The term "limitations on dismissal" in the caption of Section 1161, however, obviously refers to Section 1161(a) ("No commissioned officer may be dismissed from any armed force except" by

[9] Although a dismissal may be a penal sanction, it may also refer to the involuntary termination of an employee or member of the military. See *Webster's Third New International Dictionary of the English Language* 652 (1976) (defining "dismiss" not only as "to discharge (a military officer or cadet) without honor by reason of a sentence to dismissal by a general court-martial," but also as "to send or remove from employment, enrollment, position, or office"); *Random House Dictionary of the English Language* (2d ed. 1987) (defining "dismiss" as "to discharge or remove, as from office or service: *to dismiss an employee*").

court-martial sentence, commutation of a court-martial sentence, or presidential order in time of war), rather than Section 1161(b), where the action to drop from the rolls was codified. Unlike Section 1161(a), Section 1161(b) does not use the term "dismissal" and does not contain any limitation on dismissal. Indeed, if Congress considered dropping an officer from the rolls to be a punitive "dismissal," then Section 1161(b)'s grant of authority to drop from the rolls would be incoherent, since it would directly contradict Section 1161(a)'s limitation of such dismissals to court-martial sentences and presidential dismissals in times of war.[10]

In 1996, Section 1161(b) and Section 1167 of Title 10 were amended to permit the dropping from the rolls of an officer who has served a six-month sentence of confinement pursuant to a court-martial judgment, in addition to the previously recognized grounds of absence without leave and confinement pursuant to a conviction in a civilian court. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 563(a)(1)(A) and (b)(1), 110 Stat. 325. Nothing in Congress's action adding this ground for dropping from the rolls suggests that Congress intended to alter the by-then well established, remedial nature of the action to drop from the rolls.

2. Two conclusions follow from the above history.

First, because Congress viewed the action to drop from the rolls from its inception as a remedial measure, Congress consistently and deliberately kept it distinct from the provisions governing the system of military penal discipline. From the beginning, courts-martial could impose a punitive dismissal from the military as a penalty for the commission of an offense by an officer. See, *e.g.*, Rev. Stat. §§ 1228, 1229 (1875 ed.). But Congress carefully distinguished between

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[10] See W. Winthrop, *supra*, at 746-747 (noting that President's power to drop from the rolls does not conflict with limitations on President's power to dismiss).

the "sentencing" question whether a particular offense warranted dismissal from the military as a punishment and the "employment" question whether the government should continue to employ (and pay for the services of) a particular officer in light of his absence without leave or other misconduct. Cf. *Parker* v. *Levy*, 417 U.S. 733, 751 (1974) (government's relationship to members of the military "is not only that of lawgiver to citizen, but also that of employer to employee"). The "sentencing" issue was entrusted to the court-martial authorities and the system of military penal justice. The distinct "employment" question was left to the President and those to whom he delegated authority, to be exercised by determining whether to drop the officer from the military rolls. Even if a particular court determined that dismissal was not appropriate in a given case as a penal sanction, it remained for the administrative, non-judicial authorities to determine whether the government should continue to employ (and pay for) the services of the officer. See 36 Op. Att'y Gen. 186, 188 (1930).

Second, the history of the action to drop from the rolls reveals the broad sweep of hitherto unquestioned administrative action that would be unconstitutional under the theory adopted by the CAAF. The action to drop from the rolls began as a means to address the problem of officers who were unfit to serve because of an extended absence without leave. In 1911, Congress added to that category officers who were imprisoned for substantial sentences pursuant to judgments of civilian courts. In 1996, Congress added the instant provision permitting the military to drop from the rolls officers like respondent, who were sentenced by courts-martial to confinement in military prisons for substantial periods. Because the basic thrust and consequences of an action to drop from the rolls has remained constant, however, if the action to drop from the rolls is now a penal measure, it has always been one. In particular, if the Double Jeopardy Clause now prohibits military authorities from imposing this alleged

"punishment" after a court-martial conviction, it also has prohibited the military (since 1911) from imposing the same alleged "punishment" on those convicted of offenses in federal civilian courts.[11] See, *e.g.*, 36 Op. Att'y Gen. at 186 (discussing dropping from the rolls officer convicted of criminal offense in federal district court but given suspended sentence).

3. Respondent's remaining arguments that the action to drop from the rolls was intended to be penal, either as originally enacted or as modified in 1996, are mistaken.

Respondent argues (Br. 22) that the action to drop from the rolls is necessarily penal (and presumably always has been), because it is premised on a criminal violation—either extended absence without leave (which is a violation of military law), sentence of a court-martial, or sentence of a civilian criminal court. As we explained in our opening brief (at 30-31), however, "the fact that a * * * statute has some connection to a criminal violation is far from the clearest proof necessary to show that a proceeding is criminal." *United States* v. *Ursery*, 518 U.S. at 292 (internal quotation marks and citation omitted).

Respondent argues (Br. 22-25) that Sections 1161(b) and 1167 are penal because they were enacted as part of the same statute that contained some provisions regarding the forfeiture of military pay after a court-martial. We explained in our opening brief (at 27) that the inclusion of both penal and remedial provisions in the 518-page National Defense Authorization Act for Fiscal Year 1996 does not support the conclusion that the remedial measures are in fact penal.

4. Respondent argues (Br. 27) that the action to drop an officer from the rolls, even if intended to be remedial, should

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[11] The double jeopardy problem would arise only if the previous conviction were in a federal, not state, court. See *Waller* v. *Florida*, 397 U.S. 387, 393-394 (1970); *Grafton* v. *United States*, 206 U.S. 333 (1907).

nonetheless be viewed as penal under the analysis in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). Application of that analysis, however, does not support his conclusion that the action to drop an officer from the rolls is penal, much less provide the necessary "clearest proof" that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99-100 (citations, bracket, and internal quotation marks omitted).

For example, respondent asserts (Br. 27) that dropping him from the rolls "results in affirmative restraint," because he would "lose[] his military status and pay but remains in military prison subject to the UCMJ." His confinement in military prison is an affirmative restraint, but that confinement is the result of the judgment in his court-martial, not the result of his being dropped from the rolls. Although respondent will lose his military status and "forfeit"—*i.e.*, no longer receive, see R.C.M. 1003(b)(1)(2)—his military pay if he is dropped from the rolls, those consequences do not constitute an "affirmative restraint." Cf. *Hudson*, 522 U.S. at 104 (occupational debarment is not "an 'affirmative disability or restraint,' as that term is normally understood"). Instead, they are the natural and expected consequences of his inability to satisfy the requirements necessary to serve (and therefore be paid) as an officer in the armed forces. See Gov't Br. 29-30.

Respondent also asserts (Br. 28) that dropping officers from the rolls "promotes the traditional role of retribution and deterrence in the specialized military society" and that "[t]here is no rational alternative purpose assignable to the [dropping from the rolls] action." As the history of the dropping from the rolls action cited above demonstrates, however, the government has an interest, aside from its interests in punishing crime, in not employing (and paying for) the services of officers who have shown they are not quali-

fied for the positions they once held. The dropping from the rolls action is in service of that remedial goal.[12]

Respondent argues (Br. 30-31) that dropping him from the rolls would be penal because he would suffer "loss of *all* pay and allowances," experience "the stigma of separation with ignominy inherent in being dropped from the rolls," and lose "VA medical care" and "numerous other federal, state, and local benefits." Similar consequences may attend the commission of a crime by a civilian, who may lose a variety of pay and fringe benefits and suffer the stigma of having been fired. Nonetheless, the government is not disqualified from firing military or civilian personnel who have proven themselves unfit for their jobs, even (or especially) if the unfitness arises from having been convicted of a crime. See Gov't Br. 31. And, contrary to respondent's claim (Br. 32), the fact that the court-marital could have imposed the punitive sanction of dismissal, but did not do so, is not a basis for holding the remedial separation by dropping from the roles to be criminal punishment.

Finally, respondent argues (Br. 33-36) that, because the separation of an officer who is dropped from the rolls is not characterized as "honorable," it is necessarily penal. That is incorrect. An honorable discharge attests that an individual has satisfactorily completed military service; a separation

[12] The fact that the government could have used the administrative separation mechanism of 10 U.S.C. 1181(b) to separate respondent from the armed services is of no consequence. Congress has determined that the conviction of a sufficiently serious offense is a sufficient basis to establish that an officer should be dropped from the rolls, without the extensive procedures required in an administrative separation proceeding. Moreover, if respondent is correct that the action to drop from the rolls is penal because it is premised on conviction by a court-martial (see Resp. Br. 26-27, 28) and because it has various adverse consequences on the officer (see *id.* at 29-37), then an administrative separation that is similarly premised on a court-martial conviction and that imposes similar consequences would also be penal and would therefore (under respondent's view) be similarly unconstitutional.

from the service without an honorable discharge is a simple acknowledgment that that was not the case. It is no more "penal" than a similar statement by a private employer characterizing the circumstances under which an employee had been dismissed. If respondent's argument to the contrary were correct, then all administrative separations that result in a separation other than an honorable discharge would be penal; any such separation would be barred by a preceding court-martial based on the same "offense" and the separation would itself bar any future prosecution of the discharged officer or enlisted personnel for that "offense."[13]

* * * * *

For the foregoing reasons and those stated in our opening brief, the decision of the court of appeals should be reversed.

SETH P. WAXMAN
Solicitor General

FEBRUARY 1999

[13] Respondent argues (Br. 37-39) that Air Force regulations did not provide for dropping those in his position from the rolls and that the President did not properly delegate his statutory authority to drop him from the rolls. Neither of these issues were addressed by the court of appeals, and neither are fairly included within the questions presented. Accordingly, this Court should not address either issue. See *Roberts* v. *Galen of Virginia*, No. 97-53 (Jan. 12, 1999) slip op. 5 & n.2.

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No. 98-347

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioner,

v.

JAMES T. GOLDSMITH, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

MOTION OF NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION OF NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 37.2, the National Institute of Military Justice ("NIMJ") respectfully moves for leave to file the attached brief as *amicus curiae* urging that the petition for a writ of certiorari be granted.

1. NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ takes an active interest in the entire field of military justice, and fosters improved public understanding by such means as publication of the monthly *Military Justice Gazette* and the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces*, and the sponsorship of seminars and training programs. NIMJ has commented on and proposed changes to military procedural rules, testified before Congress, and appeared as an *amicus curiae* in the United States Court of Appeals for the Armed Forces. NIMJ's advisory board includes law professors, private practitioners and other experts in the field, none of whom are currently on active duty, but nearly all of whom have served as active duty military lawyers, up to and including flag and general officer rank. NIMJ is entirely independent of the government and relies exclusively on voluntary contributions for its programs.

2. NIMJ seeks leave to file this brief because the decision below, if allowed to stand, will continue the uncertainty that has long plagued the military justice system as to the scope of the authority of the Court of Appeals for the Armed Forces under the All Writs Act. Especially given the influence of the Court of Appeals' approach to the All Writs Act on the four service Courts of Criminal Appeals, continuing uncertainty on this issue ill

serves the public interest.

3. Counsel for petitioner has consented to the filing of this brief; counsel for respondent has withheld consent. Copies of their responses to our requests for consent have been lodged with the Clerk.

For the foregoing reasons, NIMJ respectfully moves for leave to file the attached brief.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The National Institute of Military Justice ("NIMJ") respectfully submits this brief *amicus curiae* with regard to the first question stated in the petition.* We submit this brief because, although dropping an officer from the rolls is not a frequent occurrence, the scope of the All Writs Act authority of the United States Court of Appeals for the Armed Forces is an important and recurring issue, and that

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* No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief.

court's critical institutional role is compromised when it asserts jurisdiction in excess of its statutory authority.

The Court of Appeals stands at the apex of the military justice system. What it *does* counts for much in setting the tone throughout the system. What it *says* also counts for much. "Through its decisions, the Court [of Appeals] has a significant impact on the state of discipline in the armed forces, military readiness, and the rights of servicemembers. The Court plays an indispensable role in promoting public confidence in the military justice system." S. Rep. No. 81, 101st Cong., 1st Sess. 171 (1989). It is self-defeating if, in pursuit of that objective, it compromises its own role by claiming authority Congress has not conferred on it, and invites others who properly look to it for leadership to do the same.[1]

Because of the breadth of its potential appellate jurisdiction, the Court of Appeals enjoys sweeping authority under the All Writs Act. That authority rests on a firmer footing than the decision below suggests, but it does not extend to deciding whether the Constitution forbids dropping respondent from the rolls under the legislation Congress passed in 1996.

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[1] ". . . I urge you to always keep in mind our system's constitutional roots, its accountability to the American people, its role in ensuring morale and discipline, and its relationship to the eternal truth—that the young men and women upon whom we depend for success in any endeavor must have faith in the value of doing things the right way. Military Justice must reinforce that faith." John S. Cooke, *The Twenty-Sixth Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 29 (1998).

Statement

1. Goldsmith, an Air Force officer, was convicted at a general court-martial and sentenced to a period of confinement and forfeiture of pay. His case was subject to review by the Air Force Court of Criminal Appeals as a matter of right and then to discretionary review by the Court of Appeals for the Armed Forces. The Air Force Court affirmed the findings and sentence. Goldsmith elected not to seek discretionary review by the Court of Appeals.[2]

2. After the time for seeking discretionary review had expired, Goldsmith sought extraordinary relief from the Air Force Court based on the fact that medication he needed as a result of his medical condition was being withheld by authorities at the United States Disciplinary Barracks. That court denied the writ. Thereafter, he filed a "writ appeal petition" seeking review of the Air Force Court's denial. *See* C.A.A.F.R. 4(b)(2), 18(a)(4). While that petition was pending, he added a further claim—not presented to the Air Force Court[3]—seeking to bar the Air Force from dropping him from the rolls in accordance with legislation Congress passed in 1996, after his offenses. That legislation was part of a larger measure, another provision

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[2] Under the UCMJ, all that is required for discretionary review by the Court of Appeals is "good cause." UCMJ Art. 67(a)(3), 10 U.S.C. § 867(a)(3). The factors that bear on whether *this* Court will grant certiorari, S. Ct. R. 10, are echoed in the Court of Appeals' rules, *see* C.A.A.F.R. 21(b)(4), but as a practical matter all that is required is an issue of some substance, rather than one of any special importance or generic effect.

[3] Absent good cause, the Court of Appeals' rules require resort to the Courts of Criminal Appeals before extraordinary relief is sought from it. C.A.A.F.R. 4(b)(1).

of which, concerning automatic forfeiture of pay, was held unconstitutional as an *ex post facto* law in *United States v. Gorski*, 47 M.J. 370 (1997). By the time the Court of Appeals decided his case, Goldsmith had been released from confinement, but the Air Force continued to propose dropping him from the rolls as provided in the new statute.

3. In an opinion by Senior Judge Everett, the Court of Appeals held that the medication issue had become moot, Pet. App. 8a, 15a, but noted that the Court would have jurisdiction under the All Writs Act to address issues of unlawful confinement and cruel or unusual punishment. Pet. App. 6a-7a. As for the dropping-from-the-rolls issue, the Court concluded that it had jurisdiction under the All Writs Act, Pet. App. 4a-6a, that the legislation could not constitutionally be applied to Goldsmith, Pet. App. 11a-14a, and that the Air Force was barred from dropping him from the rolls. Pet. App. 14a-15a. Chief Judge Cox and Judge Sullivan wrote separate concurring opinions. Pet. App. 15a, 17a. Judges Gierke and Crawford dissented, maintaining that dropping from the rolls would be a collateral administrative consequence of Goldsmith's confinement, over which the Court of Appeals had no jurisdiction. Pet. App. 17a.

4. Goldsmith's constitutional claim can be addressed in a variety of forums. In addition to those noted in the petition (at 12), he could sue in the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, for pay and allowances lost as a result of being dropped from the rolls.

Reasons for Granting the Writ

The linchpin of the Court of Appeals' exercise of jurisdiction is its view that

> if this Court is empowered to grant extraordinary relief in a case that it cannot possibly review directly, it is also empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court. Moreover, in our view, Goldsmith's failure to petition this Court for discretionary review pursuant to Article 67 did not waive or otherwise affect our extraordinary-writ jurisdiction in connection with this case. Pet. App. 6a.

This view disregards the requirement that an extraordinary writ be "in aid of" the issuing court's basic grant of jurisdiction. 28 U.S.C. § 1651(a). This error is more fundamental than whether dropping from the rolls is administrative or punitive.

The UCMJ defines the categories of cases that are subject to review by the Court of Appeals. UCMJ Arts. 66-67, 10 U.S.C. §§ 866-67. The Court's application of the All Writs Act to cases outside those categories has been inconsistent. After some initial uncertainty, *see* Michael E. Brown, Note, *Building a System of Military Justice Through the All Writs Act*, 52 IND. L.J. 189, 190-91 & n.17 (1976) (quoting *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969)); *United States v. Snyder*, 18 C.M.A. 480, 40 C.M.R. 192 (1969), it claimed in *McPhail v. United States*, 1 M.J. 457 (1976), to have writ authority in a subjurisdictional special court-martial. The author of *McPhail* later repudiat-

ed it, *Stewart v. Stevens*, 5 M.J. 220, 221 (1978) (Cook, J., concurring), but the doctrinal course had been set.

Since then, the Court of Appeals has claimed All Writs Act authority in such settings as a Navy special court-martial that could not have triggered review by the military appellate courts because the accused was a commissioned officer, *Unger v. Ziemniak*, 27 M.J. 349 (1989); a Navy general court-martial that could not have reached it because the intermediate court had in effect entered an unappealable acquittal, *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (1988); Air Force general courts-martial that were not subject to appellate court review because the accused had been acquitted at trial, *Gray v. Mahoney*, 39 M.J. 299 (1994); and a nonjudicial punishment that falls outside the military appellate courts' normal purview. *Fletcher v. Covington*, 42 M.J. 215 (1995); *see* note 8 *infra*.

With the exception of *Carlucci*, where the court blocked an Inspector General investigation of intermediate military appellate judges,[4] it has claimed jurisdiction but declined to issue any writ beyond a stay.[5] As a result, its jurisdictional claims have, until now, escaped review on certiorari. It is on this line of cases (and the notion of pendent jurisdiction) that the Court of Appeals' rested its claim to authority in Goldsmith's case. *See* Pet. App. 5a-6a

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[4] The court predicated its All Writs Act authority on, among other things, the notion that if the judges who sought relief were to disobey an order to cooperate in the investigation, they themselves would have been subject to court-martial. *Id.* at 333.

[5] In *Gray*, the Court of Appeals' All Writs Act authority was not disputed. 39 M.J. at 303. The cases are surveyed in DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 17-19, at 824-25 & nn.5-13 (4th ed. 1996).

& n.3, 9a.[6]

While dropping from the rolls is scarcely an everyday occurrence, the mischief threatened by the Court of Appeals' claim to All Writs Act authority that exceeds its broad potential appellate jurisdiction is substantial. It blurs the line between the statutory supervisory responsibility of the Judge Advocates General, *see* UCMJ Arts. 6, 69, 10 U.S.C. §§ 806, 869, and other military authorities, on the one hand, and the role of the Court of Appeals, on the other. By doing so, it creates a possible no-man's land where real abuses may lurk undetected or, worse yet, become the object of a corrosive tug-of-war between court and military. By perpetuating past claims to a sweeping jurisdiction whose parameters are necessarily uncharted, the decision below fosters uncertainty and compromises the ability of all concerned in the court-martial process—commanders and their legal advisers, prosecutors, defense counsel and accuseds—to exercise their rights intelligently and perform their functions in a lawful manner. Ironically, because the Court of Appeals' claimed jurisdiction is subject to the prudential standards applicable to extraordinary relief, it may also prove to be illusory for GIs who might seek to invoke it.

Significantly, to the extent that the four service Courts of Criminal Appeals take their lead from the Court of Appeals in considering the limits of their own All Writs Act authority over cases not subject to normal review, the danger that those courts will adopt a similar approach cannot be dismissed. Indeed, even before the decision below was handed down, there was reason to be concerned on this

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[6] The Court of Appeals cited no authority for the proposition that Goldsmith could invoke its All Writs Act power even though he had waived discretionary review. It also did not explain how allowing such a litigant to do so was "in aid of" its jurisdiction. Pet. App. 6a.

score. For example, in *Dew v. United States*, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998) (en banc), *writ app. petition filed*, No. 98-817 (C.A.A.F. May 15, 1998), the Army Court asserted that "[o]ur authority to issue extraordinary writs 'in aid of jurisdiction' under the All Writs Act is not limited to our actual or potential appellate jurisdiction defined in Articles 62, 66, and 69" of the UCMJ, 10 U.S.C. §§ 862, 866, 869.

The second prong of the Court of Appeals' jurisdictional claim, *see* p. 5 *supra*, is also troublesome. It is difficult to view an extraordinary writ as being "in aid of" the issuing court's jurisdiction where the party seeking the writ elected not to invoke that jurisdiction in the first place and there is no suggestion of chicanery or a miscarriage of justice in the appellate process.[7] Of course, a different question would be presented if, for example, the waiver were claimed to have been the result of ineffective assistance of counsel, overreaching, or some other factor that compromised the appellate process. Nothing in the decision below suggests that this is such a case.

The principle of civilian appellate review of courts-martial is at the core of the UCMJ. It is a model that has been embraced by other common law democracies with which we share cherished legal and political traditions. Not

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[7] *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943), observed that a court's All Writs Act authority "extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." On its face this could be read to cover cases where, as here, the time to perfect an appeal has passed, rather than not yet elapsed. The next sentence of Chief Justice Stone's opinion refers, however, to the possibility that appellate jurisdiction could be defeated, thus making it clear that he had in mind appeals that could still be perfected, and not those for which the deadline had expired.

for nothing has Congress insisted that the judges of the Court of Appeals be drawn from civilian life, UCMJ Art. 142(b)(1), 10 U.S.C. § 942(b)(1), and included them in the Code Committee that Congress intended to function as its eyes and ears on the military justice system. UCMJ Art. 146, 10 U.S.C. § 946. A strong Court of Appeals for the Armed Forces is central to both civilian control of the military and public confidence in the fair administration of military justice. Experience over the years teaches that the power to grant extraordinary relief is indeed integral to the Court of Appeals' role. At the same time, however, *excessive* claims, framed in the language of the All Writs Act, may squander the court's hard-earned institutional capital and thus defeat the larger congressional purpose.

These considerations favor a grant of certiorari. If, in the end, the decision below is reversed, the congressional goal of effective civilian appellate oversight of military justice will still be served because the Court of Appeals will still enjoy broad All Writs Act power not only as to cases that reach it as a result of its core Article 67 grant of jurisdiction but also as to those cases that remain subject to its *potential* appellate jurisdiction. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966).[8]

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[8] Under § 1302 of National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1576 (1989), the Judge Advocates General can refer *any* court-martial—even a summary court-martial—to the Courts of Criminal Appeals, from which review could in turn be sought in the Court of Appeals. For this reason, while the Court of Appeals lacked the All Writs Act power it claimed in *Unger*, it would have that authority if a similar case were to arise today. Nonjudicial punishments remain outside the Court's direct authority, but can be ruled on when they figure in courts-martial that are otherwise within its jurisdiction. *E.g.*, *United States v.*

While Congress has not conducted extended hearings on military justice in many years, the entire subject has received unusual public attention in recent years as a result of a spate of high-profile courts-martial. For this reason, one might expect that Congress would revisit the military appellate architecture and make whatever alterations seem warranted in light of this Court's disposition of this case.[9] Perhaps the "particular needs of the military justice system . . . may be enough" to warrant a departure from conventional All Writs Act analysis. Edward H. Cooper, *Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts*, 98 F.R.D. 593, 604 (1983), noted in *Carlucci, supra*, 26 M.J. at 331 n.5. That, however, is for Congress to decide.

This case concerns what Congress has done, not what it might do. Whether the Court of Appeals and the service Courts of Criminal Appeals have supervisory power over their subordinate courts "is a highly controversial topic of great significance." 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 25-20.00, at 36 & n.65.1 (Cum. Supp. 1995). "The legitimacy and parameters of [the Court of Appeals'] supervisory jurisdiction remain[] uncertain." JONATHAN LURIE, PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980 275 (1998). Review is necessary to resolve that uncertainty.

Edwards, 46 M.J. 41 (1997).

[9] Congress also has before it a study of judicial review of military personnel administrative actions. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 551, 110 Stat. 318 (1996).

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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